Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 662

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 663

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CRESCENT AMUSEMENT COMPANY, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., ET AL.

No. 664

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL., APPELLANTS

vs.

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED FEBRUARY 1, 1944.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA, Plaintiff

v.

CRESCENT AMUSEMENT COMPANY, INC., LYRIC AMUSEMENT COMPANY, INC., New Strand Company, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Inc., Cherokee Amusement Company, Inc., Kentucky Amusement, Inc., Muscle Shoals Theatres, Inc., Anthony Sudekum, R. E. Baulch, Kermit C. Stengel, Louis Rosenbaum, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., United Artists Corporation, and Columbia Pictures Corporation, Defendants

COMPLAINT—Filed August 11, 1939

The United States of America by Horace Frierson, United States Attorney for the Middle District of Tennessee, acting under the direction of Frank Murphy, Attorney General, brings this proceeding in which equitable relief is sought [fol. 3-2] under Section 4 of the Act of Congress of July 2, 1890 (26 Stat. 209), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act, against the above named defendants, which are more fully described as follows:

Description of Defendants

1. Crescent Amusement Company, Inc., hereinafter referred to as Crescent, is a corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business in Nashville, Tennessee. It operates one or more motion-picture theaters in each of the towns of Brownsville, Clarksville, Cleveland, Columbia,

Dyersburg, Greenville, Lebanon, Maryville, Morristown, Murfreesboro, Paris, Springfield, Union City, Madisonville and Nashville, in the State of Tennessee. It also operates one or more theaters in each of the towns of Bowling Green, Earlington, and Hopkinsville, in the State of Kentucky, and Alabama City, Decatur, and Gadsden, in the State of Alabama.

2. Lyric Amusement Company, Inc., hereinafter referred to as Lyric, is a corporation organized and existing under the laws of Alabama, with its principal office in Nashville, Tennessee. It operates one or more theaters in the town of Huntsville, Alabama.

[fol. 3-3] 3. New Strand Company, hereinafter referred to as Strand, is a corporation organized and existing under the laws of Virginia, with its principal office in Nashville, Tennessee. It operates one or more theaters in the town of Kingsport, Tennessee.

4. Cumberland Amusement Company, hereinafter referred to as Cumberland, is a corporation organized and existing under the laws of Tennessee, having its principal office at Tullahoma, Tennessee. It operates one or more theaters in the towns of Tullahoma, Dayton, Rogersville, Crossville, Winchester, McMinnville, Sparta, South Pittsburg, Pulaski, Fayetteville, and Franklin, in the State of Tennessee.

5. Strand Enterprise Corporation, hereinafter referred to as Enterprise, is a corporation organized and existing under the laws of Tennessee, with its principal office at Ridgely, Tennessee. It operates one or more theaters in each of the towns of Ridgely, Ripley, Trenton, Tiptonville, and Philadelphia, in the State of Tennessee; Parkins, Marked Tree, Earl, and LePanto, in the State of Arkansas; Kosciusko, Lexington, Louisville, Morehead, Itla Bena, and Durant, in the State of Mississippi, and Clinton in the State of Kentucky.

6. Rockwood Amusements Inc., hereinafter referred to as Rockwood, is a corporation organized and existing under the laws of Tennessee. It operates one or more theaters in each of the towns of Rockwood, Tracy City, Coal Creek, Manchester, and Huntingdon, in the State of Tennessee, and [fol. 3-4] in Guthrie, Kentucky.

7. Cherokee Amusement Company, Inc., hereinafter referred to as Cherokee, is a corporation organized and exist-

ing under the laws of Tennessee, with its principal office at Erwin, Tennessee. It operates one or more theaters in each of the towns of Erwin, Sweetwater, Lenoir City, La Follette, and Oneida, in the State of Tennessee.

8. Kentucky Amusement, Inc., is a corporation organized under the laws of the State of Tennessee, with its principal office in Elizabethtown, Kentucky. It operates a theater in the town of Elizabethtown, Kentucky.

9. Muscle Shoals Theaters, Inc., hereinafter referred to as Muscle Shoals, is a corporation organized and existing under the laws of Alabama. It operates one or more theaters in each of the towns of Athens, Florence, Tuscumbia, and Sheffield, in the State of Alabama.

10. Anthony Sudekum is President and a director of Crescent, Lyric, Strand, Cumberland, Enterprise, and Muscle Shoals. He resides at Nashville, Tennessee.

11. R. E. Baulch is Secretary and a Director of Crescent, Lyric, Strand, Enterprise, and is a Director of Cumberland. He resides at Nashville, Tennessee.

12. Kermit C. Stengel is President and a Director of Cherokee and Kentucky Amusement and an officer and director of Muscle Shoals.

[fol. 3-5] 13. Louis Rosenbaum is Vice-President and a Director of Muscle Shoals and resides in Florence, Alabama.

14. The nine defendants, Crescent, Lyric, Strand, Cumberland, Enterprise, Rockwood, Cherokee, Kentucky Amusement, and Muscle Shoals are hereinafter referred to as the defendant exhibitors. The towns in which they operate are hereinafter collectively referred to as Crescent Towns.

15. Defendants Lyric, Strand, Cumberland, Enterprise, Rockwood, Cherokee, Kentucky Amusement, and Muscle Shoals are either affiliated with or controlled by Crescent or by the officers and directors of Crescent, and are operated under the control and direction of defendant Sudekum.

16. Paramount Pictures, Inc., hereinafter referred to as Paramount, is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 1501 Broadway, in the City of New York, New York.

17. Paramount Film Distributing Corporation, hereinafter referred to as Paramount Film, a wholly owned subsidiary of Paramount, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1501 Broadway, in the City of New York, New York.

18. Loew's, Incorporated, hereinafter referred to as Loew's, is a corporation organized and existing under the [fol. 3-6] laws of the State of New York and has its principal place of business at 1540 Broadway in the City of New York, New York.

19. Radio-Keith-Orpheum Corporation, hereinafter referred to as RKO, is a corporation organized and existing under the laws of the State of Maryland, and has its principal place of business at 1270 Sixth Avenue, in the City of New York, New York.

20. Warner Bros. Pictures, Inc., hereinafter referred to as Warner Bros., is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 321 West 44th Street, New York, New York.

21. Vitagraph, Inc., hereinafter referred to as Vitagraph, a wholly owned subsidiary of Warner Bros., is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 321 West 44th Street, New York, New York.

22. Twentieth Century-Fox Film Corporation, hereinafter referred to as Fox; is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 444 West 56th Street, in the City of New York, New York.

23. Universal Pictures Company, Inc., hereinafter referred to as Universal, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1250 Sixth Avenue, in the City [fol. 3-7] of New York, New York.

24. Universal Film Exchanges, Inc., hereinafter referred to as Universal Film, a subsidiary of Universal, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 1250 Sixth Avenue, in the City of New York, New York.

25. United Artists Corporation, hereinafter referred to as United Artists, is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 729 Seventh Avenue, in the City of New York, New York.

26. Columbia Pictures Corporation, hereinafter referred to as Columbia, is a corporation organized and existing under the laws of the State of New York, and has its principal place of business at 729 Seventh Avenue, in the City of New York, New York.

27. The defendants Paramount, Paramount Film, Loew's RKO, Warner Bros., Vitagraph, Fox, Universal, Universal Film, United Artists, and Columbia are engaged, either directly or through subsidiary or associated companies, in the business of distributing motion-picture films in interstate commerce throughout the United States, including the states of Alabama, Kentucky, Tennessee, Arkansas, and Mississippi. They are hereinafter referred to as the defendant distributors.

[fol. 3-8] Definition of Terms [1]

28. First-run exhibition in a town is the initial exhibition of a motion picture in that town with first-run clearance.

29. Second-run exhibition in a town is the exhibition of a motion picture with second-run clearance, which has been previously shown in the same town.

30. A first-run theater is a motion-picture theater which customarily exhibits first-class pictures on first run.

31. A second-run theater is a motion-picture theater which customarily exhibits first-class pictures on second run.

32. Feature pictures are motion pictures five or more reels in length.

33. Clearance is protection against competition granted to an exhibitor, by agreement with a distributor, which limits the terms on which the distributor may license films to other competing exhibitors.

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[1] These definitions apply only to the use of these terms in this complaint.

34. First-run clearance is the protection customarily given to a first-run theater by a distributor of feature pictures against competition resulting from the subsequent exhibition of its feature pictures at other theaters in the same town. Said protection generally takes the form of an agreement by the distributor covering a period of one year or more, during which it agrees not to license its feature pic- [fol. 3-9] tures for exhibition at other theaters in the same town until a specified period has elapsed after the conclusion of their exhibition in the first-run theater and further agrees not to license said pictures to said other theaters unless said other theaters maintain a specified minimum admission price.

35. Second-run clearance is the protection given a second-run theater by a distributor of feature pictures against competition resulting from the exhibition of its feature pictures at other theaters in the same town subsequent to the second run. Said protection generally takes the form of an agreement similar to that described in the preceding paragraph.

Description of Business Involved

36. The defendant distributors have collectively released during each of the past five years more than ninety percent of the first-class pictures exhibited in Crescent towns.

37. First-class pictures generally have the highest production cost, are made with the aid of the best acting, directing, writing, and technical talent, and possess the greatest box-office value to an exhibitor. They also receive the maximum advertising expenditure by the distributors and their prior exhibition in metropolitan centers serves to further advertise and make them attractive to the patrons of [fol. 3-10] motion-picture theaters in the Crescent towns.

38. The defendant distributors have collectively released during each of the past five years more than seventy-five percent of all feature pictures exhibited in the Crescent towns.

39. The feature pictures released by the defendant distributors have constituted the principal entertainment furnished by any exhibitor in said towns during each of the said past five years.

40. In order successfully to operate a first-run theater in any of the Crescent towns an exhibitor must be able to exhibit on first run each year a substantial number of the feature pictures released by three or more of the defendant distributors each year.

41. In order successfully to operate a second-run theater in any of the Crescent towns an exhibitor must be able to exhibit on second run each year a substantial number of the feature pictures released by three or more of the defendant distributors each year.

42. In order successfully to operate any motion picture theater in any of said Crescent towns an exhibitor must be able to exhibit on some run a substantial number of first-class pictures released by three or more of the defendant distributors each year.

43. The defendant exhibitors have been able to take over the operation of numerous theaters and keep other theaters [fol. 3-11] closed in said Crescent towns during the past five years by virtue of the control exercised by them over the licensing of feature pictures for exhibition in said towns as hereinafter alleged.

44. The prints of feature pictures released by defendant distributors which are used by exhibitors, including the defendant exhibitors, in Alabama, Kentucky, Tennessee, Mississippi, and Arkansas are manufactured entirely in other states; each print is used successively by numerous exhibitors and moves continuously across state lines in the course of such use.

Violations Alleged

45. For the past five years the defendant exhibitors have continuously combined with each other and with each of the defendant distributors unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures and the operation of motion-picture theaters in the Crescent towns and in other towns in Tennessee, Alabama, Kentucky, Arkansas, and Mississippi in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

46. Said exhibitors have refrained from competing with each other in the acquisition and operation of motion-pic-

ture theaters in said towns pursuant to express or implied agreements to allocate said territory between them.

[fol. 3-12] 47. During each of the past five years said exhibitors have collectively contracted with each of the defendant distributors for all of the feature pictures annually required for exhibition at all of the theaters operated by them in said towns, in advance of the production and distribution of such feature pictures and before such feature pictures or any of them have been offered to any other exhibitor in the said towns, with the purpose and effect of controlling and monopolizing the supply of feature pictures available for exhibition in said towns.

48. By said contracts said exhibitors have combined with each other to compel each of the defendant distributors to grant to all of them in all of said towns the following exclusive privileges during the time they have operated theaters in said towns.

(a) The exclusive privilege of selecting from the feature pictures released by said distributors such feature pictures as said exhibitors deemed suitable for exhibition in said towns, as and when prints thereof became available, before said pictures were released to any other exhibitors in said towns.

(b) The exclusive privilege of receiving clearance on said feature pictures over competing theaters in said towns.

49. The foregoing exclusive privileges have enabled the defendant exhibitors unreasonably to restrain, suppress, [fol. 3-13] and eliminate the competition offered by other theater operators in said Crescent towns by—

(a) Preventing them from obtaining enough first-class pictures for exhibition to operate their theaters successfully.

(b) Forcing them to exhibit feature pictures previously exhibited or rejected by the defendant exhibitors and to maintain admission prices for such pictures higher than those warranted by the quality of the entertainment they were thus able to offer.

(c) Preventing them from showing any feature pictures released by the defendant distributors with first-run clearance in any of said towns.

(d) Preventing them from exhibiting any feature pictures released by the defendant distributors with second-run clearance in any of said towns where any of the defendant exhibitors operate one or more second-run theaters.

50. For the past five years all of the defendant distributors have combined with each other and with each of the defendant exhibitors unreasonably to restrain interstate trade and commerce in motion-picture films and to monopolize and attempt to monopolize the exhibition of motion pictures and the operation of motion-picture theaters in the Crescent towns in violation of Sections 1 and 2 of the Sherman Act in the following manner:

51. During each of the past five years said distributors have followed the policy of contracting with the defendant [fol. 3-14] exhibitors for all of the feature pictures which said exhibitors required for exhibition in said towns, in advance of the production and distribution of such feature pictures and before such feature pictures or any of them have been offered to any other exhibitor in said towns, with the purpose and effect of permitting each of the defendant exhibitors to control and monopolize the supply of feature pictures available for exhibition in said towns.

52. By said contracts said distributors have granted to each of the said exhibitors in the respective towns in which they operate theaters the exclusive privilege of selecting from the feature pictures released by said distributors such feature pictures as said exhibitors deemed suitable for exhibition in said towns as and when prints thereof became available, before said pictures were released to any other exhibitors in said towns.

53. Each of the defendant distributors has imposed the foregoing restraints upon competing exhibitors at the instance and request of the defendant exhibitors and pursuant to agreements made with them, with full knowledge of the action taken by all the other said defendant distributors, and with full knowledge of the effect of such action upon the competitors of defendant exhibitors.

54. By reason of the control by defendant exhibitors of the most desirable motion pictures as hereinbefore set forth, defendant exhibitors have been able practically to

[fol. 3-15] eliminate the competition of independent exhibitors in the Crescent towns. Independent exhibitors have been induced to sell their theaters to defendant exhibitors under the threat, express or implied, that if they refused to sell, defendant exhibitors would open competing theaters in the same town and prevent the independent exhibitor from procuring desirable pictures. In a number of instances, independent exhibitors attempting to compete with defendant exhibitors have found it impossible to procure sufficient pictures to keep their theaters in operation. In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes and operated some of their theaters at a loss with the purpose and effect of driving their competitors out of business and giving defendant exhibitors a monopoly in the exhibition of motion pictures in the area in which they operate. By the use of such tactics defendant exhibitors have forced a large number of independent exhibitors in the states of Tennessee, Kentucky, Alabama, Mississippi, and Arkansas out of the motion-picture business and, unless restrained and enjoined by this court, will continue to do so in the future until they have complete control of the motion picture exhibition business in the area in which they operate.

55. The defendant exhibitors are what is commonly referred to in the motion-picture industry as a circuit of theaters. As a result of the acquisition and operation of [fol. 3-16] numerous theaters as hereinbefore alleged, the said exhibitors have obtained what is commonly referred to in the motion-picture industry as circuit-buying power. Said circuit-buying power is now so great that its use in the manner set forth herein in and of itself constitutes a violation of the Sherman Act.

Relief Prayed

Wherefore, plaintiff prays:

1. That the combinations in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

2. That the defendants herein, and each of them, and each and all of their respective officers and directors, and each and all of their respective agents, servants, and em-

ployees, and all persons acting or claiming to act on behalf of the defendants, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in motion pictures described herein, and from entering into and carrying out, directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

[fol. 3-17] 3. That the defendant exhibitors herein, and any two or more of them, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them be perpetually enjoined and restrained from jointly or collectively negotiating any contracts for the licensing of feature pictures with any of the defendant distributors or their successors in interest.

4. That the defendant distributors herein, and each and all of their respective officers and directors, and each and all of their respective servants, agents, and employees, and all persons acting or claiming to act on behalf of said defendants or any of them, be perpetually enjoined and restrained from licensing features pictures for exhibition on any run at any theater in any of the Crescent towns, except upon a local competitive basis whereby all theaters operating in each of said towns will have an equal opportunity to license pictures for that area without regard to whether these theaters or any of them form or constitute a part of a circuit of theaters.

5. That the defendant exhibitors, and each of them, be dissolved and that their respective properties be rearranged under several separate and independent corporations in such a manner as to terminate effectively the aforesaid [fol. 3-18] monopolistic control in the licensing and exhibition of motion pictures and prevent further violations of the Sherman Antitrust Act, and that said exhibitor defendants, their officers, directors, agents, and representatives be required to make such divestiture and conveyances of their stockholdings and properties as shall be necessary in order to accomplish such dissolution.

6. That the Court appoint such receivers and trustees as may be necessary and appropriate to effectuate a dissolution of the said exhibitor defendants, and each of them, and of the aforesaid monopoly in the licensing and exhibition of motion pictures.

7. That the defendant exhibitors and each of them be enjoined and restrained from acquiring any additional theaters or financial interests therein, except where they shall establish to the satisfaction of this Court that such acquisitions will not unreasonably restrain competition or create or tend to create a monopoly in the licensing of feature pictures for first-run or second-run exhibition or in the operation of first-run or second-run theaters in any of the towns in which they operate theaters.

8. That the plaintiff shall have such other and further relief as the Court shall deem just.

[fol. 3-19] 9. That the plaintiff recover its costs and disbursements.

Horace Frierson, United States Attorney for the Middle District of Tennessee, Solicitor for Plaintiff. O. W. Hughes, Assistant U. S. Attorney. Frank Murphy, Attorney General. Thurman Arnold, Assistant Attorney General. Wendell Berge, Holmes Baldridge, Paul Williams, Robert E. Sher, Special Assistants to the Attorney General.

[fol. 4] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF ANTHONY STUMPO, R. E. BAULCH, KERMIT C. STENGEL AND THE CRESCENT AMUSEMENT COMANY, ET AL., REFERRED TO AS EXHIBITORS IN THE COMPLAINT—Filed September 6, 1940

The defendants herein, The Crescent Amusement Company, (Erroneously sued as Crescent Amusement Company, Inc.), Lyric Amusement Company, Inc., Nu-Strand Corporation, (erroneously sued as New Strand Company), Cum-

berland Amusement Company, Strand Enterprises, Inc., (erroneously sued as Strand Enterprise Corporation), Rockwood Amusements, Inc., Cherokee Amusements, Inc., (erroneously sued as Cherokee Amusement Company, Inc.), Kentucky Amusement Co., Inc., (erroneously sued as Kentucky Amusement, Inc.), Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united in this answer for the convenience of the Court, for answer to the complaint, say:

1. Defendants admit Section 1 of the complaint is true, except that the correct corporate name is The Crescent Amusement Company.

2. Defendants admit Section 2 of the complaint is true.

3. Defendants admit Section 3 of the complaint is true except that the correct corporate name is Nu-Strand Corporation.

4. Defendants admit Section 4 of the complaint is true except that the principal office of the Cumberland Amuse- [fol. 5] ment Company is in McMinnville, Tennessee, instead of Tullahoma, Tennessee, and except that the Cumberland Amusement Company does not operate a theater in Rogersville, Tennessee, and did not at the time of the filing of this complaint.

5. Defendants admit Section 5 of the complaint is true except that the proper corporate name is Strand Enterprises, Inc., and the principal office of the corporation is at Memphis, Tennessee and not Ridgely, Tennessee.

6. Defendants admit Section 6 of the complaint is true.

7. Defendants admit Section 7 of the complaint is true except that the proper corporate name is Cherokee Amusements, Inc.

8. Defendants admit Section 8 of the complaint is true except that the proper corporate name is Kentucky Amusement Co., Inc., and it is a Kentucky corporation and not a Tennessee corporation.

9. Defendants deny that there is any such corporation as the Muscle Shoals Theaters, Inc. They admit there is a partnership operating under the name of Muscle Shoals Theaters which does operate one or more theaters in the towns mentioned in Section 9 of the complaint.

10. Defendants admit that Section 10 of the complaint is true except that Anthony Sudekum is not President of or a Director in Strand Enterprises, Inc. or Muscle Shoals.

11. Defendants admit that Section 11 of the complaint is true.

12. Defendants deny Section 12 of the complaint except they admit that Kermit C. Stengel is a Director and Vice-President of Cherokee, and is a Director and Secretary-Treasurer of Kentucky Amusements.

13. Defendants deny Section 13 of the complaint except they admit that Louis Rosenbaum does reside in Florence, Alabama.

14. Defendants admit Section 14 of the complaint is true for the purposes of this suit.

15. Defendants deny Section 15 of the complaint except [fol. 6] they admit that defendant, Crescent, owns 50% of the voting stock of defendants, Lyric, Nu-Strand, Cumberland and Strand Enterprises; that defendant, Stengel, owns more than 50% of the voting stock of defendant, Rockwood, and less than the majority of the voting stock of defendant, Cherokee, and 50% of the voting stock of defendant, Kentucky.

16-26. Defendants are without knowledge or information sufficient to form a belief as to the truth of any of the averments in Sections 16-26, both inclusive, of the complaint.

27. Defendants admit Section 27 of the complaint is true except that they are without knowledge or information sufficient to form a belief as to the truth of the averment that the distributor defendants named therein distribute motion picture films "throughout the United States."

28-35. Defendants accept the definition of terms set out in Sections 28-35, both inclusive, of the complaint for the purposes of this suit except that they deny the averment in Section 34 that the protection of first-run clearance generally takes the form of an agreement by the distributor whereby the distributor agrees not to license its feature pictures to other theaters in the same town "unless said other theaters maintain a specified minimum admission price," and except that they deny the averments in Section 35 of the complaint that second-run clearance protection "gener-

ally takes the form of an agreement similar to that described in the preceding paragraph."

36. Defendants deny Section 36 of the complaint except they admit that a majority of the first-class pictures (as defined in Section 37 of the complaint) which were exhibited in Crescent towns in the past five years were released by the defendant distributors.

37. Defendants deny Section 37 of the complaint except they admit that in some instances first-class pictures have the highest production cost, are made with the aid of the best acting, directing, writing and technical talent, and possess the greatest box-office value to an exhibitor, but they deny that this is so in every instance; and admit that [fol. 7] first-class pictures sometimes receive the maximum advertising expenditure by the distributors and that their prior exhibition in metropolitan centers serves to further advertise and make them attractive to the patrons of motion-picture theaters in the Crescent towns, but this is not always true.

38. Defendants deny Section 38 of the complaint except they admit that a majority of all feature pictures exhibited in the Crescent towns during each of the past five years have been released by the defendant distributors.

39. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Section 39 of the complaint.

40-43. Defendants deny Sections 40-43, both inclusive, of the complaint.

44. Defendants admit Section 44 of the complaint except that the allegation in this Section that each print "moves continuously across state lines in the course of such use" is denied.

45-46. Defendants deny Sections 45-46, both inclusive, of the complaint.

47. Defendants deny Section 47 of the complaint except they admit it is customary for all exhibitors in the motion picture industry to purchase feature pictures in advance of the production and distribution of same.

48-50. Defendants deny Sections 48-50, both inclusive, of the complaint.

51-52. Defendants deny Sections 51-52, both inclusive, of the complaint except they admit that during each of the past five years said distributors have followed the policy of "block booking" with exhibitors, which means that they release their feature pictures only in blocks in advance of production and distribution, with the privilege on the part of the exhibitor of rejecting a small percentage thereof.

[fol. 8] 53-54. Defendants deny Sections 53-54, both inclusive, of the complaint.

55. Defendants deny Section 55 of the complaint except they admit that each one of them operates more than one theater and in that sense may be considered as operating a circuit of theaters and admit that each such circuit contracts for the pictures exhibited in the theaters operated by it.

Wherefore these defendants demand judgment dismissing the complaint as to them with costs.

(S.) Geo. H. Armistead, Jr., Attorney. American Trust Building, Nashville, Tenn.

Of Counsel: McConnico, Armistead, Waller & Davis, American Trust Building, Nashville, Tenn.

[fol. 9] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

ANSWER OF LOUIS ROSENBAUM AND NETTIE E. SUDEKUM, PARTNERS DOING BUSINESS UNDER THE TRADE NAME OF MUSCLE SHOALS THEATRES; AND MUSCLE SHOALS THEATRES, A PARTNERSHIP—Filed September 14, 1940

Defendants Louis Rosenbaum and Nettie E. Sudekum, partners doing business under the trade name of Muscle Shoals Theatres, and Muscle Shoals Theatres, a partnership, answering the original bill, allege and say:

1. Defendants have no knowledge as to the allegations of Section 1 to 8, inclusive of the bill.

2. Answering Section 9 of the bill, and the amendment thereto, these defendants allege that there is no corporation of the name Muscle Shoals Theatres, Inc., but these defend-

ants operate a business under the style of Muscle Shoals Theatres. Such business is a partnership and it does operate one or more theatres in each of the towns, Athens, Florence, Sheffield and Tuscumbia, Alabama.

3. Defendants admit the allegations of Section 10 of the bill, excepting they deny that said Anthony Sudekum is an officer or director in Muscle Shoals Theatres, a partnership.

4. Defendants have no knowledge of Section 11 and 12 of the bill.

5. Answering Section 13 of the bill: Louis Rosenbaum is not a vice president and director of Muscle Shoals Theatres, but he is a partner in said enterprise.

[fol. 10] 6. Answering Sections 14 to 27 of the bill, defendant has no knowledge as to the matters of fact therein alleged.

7. Defendants admit the allegations of Section 28 to 33 of the bill inclusive.

8. The allegations of Section 34 and Section 35 are not universally true, and upon information and belief defendants deny the allegations of said sections.

9. Defendants have no knowledge of the allegations of Sections 36, 38, 39, 40, 41, 42, 43, and 44 of the bill, and require strict proof.

10. Answering Section 37 of the bill, defendants deny that the allegations of Section 37 of the bill are universally true, but they admit that they are to some extent and in many instances true.

11. Defendants deny the allegations of Sections 45, 46, 47, 48, and 49 and 50 of the bill, and demand strict proof.

12. Defendants deny the allegations of Section 51 to 54, inclusive, of the bill, and require strict proof.

13. Defendants deny the allegations of Section 55 of the bill.

And now having fully answered, these defendants pray *and* they may go hence dismissed, with their reasonable cost in this behalf expended.

Mitchell & Poellnitz, Attorneys for Defendants, Nettie E. Sudekum, Louis Rosenbaum, and Muscle Shoals Theatres, a partnership.

[fol. 11] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION TO AMEND COMPLAINT—Filed December 27, 1940

To McCONNICO, Armistead, Waller and Davis, Nashville, Tennessee, Attorneys for Crescent Amusement Company, Inc., Lyric Amusement Company, Inc., New Strand Company, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Inc., Cherokee Amusement Company, Inc., Kentucky Amusement Company, Inc., Kentucky Amusement, Inc., Anthony Sudekum, R. E. Baulch, Kermit C. Stengel; W. H. Mitchell, Florence Alabama, Attorney for Nettie Sudekum and Louis Rosenbaum; Canale, Glankler, Loch and Little, Memphis, Tennessee, Attorneys for RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Vitagraph, Inc., Warner [fol. 12] Bros. Pictures, Inc., Cornelius McKinney & Gilbert, 3rd National Bank Bldg., Nashville, Tennessee, Attorneys for Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Universal Pictures Company, Inc.:

Please take notice that plaintiff herein will appear before the Honorable Elmer D. Davies in Room —, United States Court House at Nashville, Tennessee at 9 a. m. on the 3d day of Jan. 1941, and move the court for the entry of an order granting leave to amend the complaint herein by striking therefrom the allegations contained in paragraphs numbered 50 to 53 inclusive thereof, upon the ground that said paragraphs contained allegations which the plaintiff does not intend to support by proof at the trial of the case.

A copy of the order sought is attached hereto and expressly made a part hereof.

Owen W. Hughes, Assistant United States Attorney for the Middle District of Tennessee, Nashville Division; Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 13] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION—Filed December 27, 1940

The United States of America, plaintiff herein, and the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc. and Twentieth Century-Fox Film Corporation, hereby stipulate and agree by their respective counsel that an order may be entered herein dismissing the complaint as to said defendants.

Owen W. Hughes, Assistant United States Attorney for the Middle District of Tennessee, Nashville Division; Allen A. Dobey, Special Assistant to the Attorney General; Canale, Glanklin, Loch and Little, Harold S. Luckler, Memphis, Tennessee, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, Vitagraph, Inc., Warner Bros. Pictures, Inc.

[fol. 14] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER AMENDING COMPLAINT—January 3, 1941

Upon the motion of the plaintiff herein, due notice thereof having been served upon counsel for all defendants and the court being fully advised in the premises; it is hereby Ordered, Adjudged and Decreed that the plaintiff be granted leave to amend the complaint herein by striking therefrom all of the allegations contained in paragraphs 50 to 53 inclusive thereof and said paragraphs are hereby stricken from said complaint.

Enter: Elmer D. Davies, Judge.

O. K.: O. W. Hughes, Asst. U. S. Atty.

[fol. 15] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

CLERK'S CERTIFICATE—Filed January 17, 1944

I, L. B. Ormes, Clerk of the United States District Court for the Middle District of Tennessee, hereby certify that the Supplement to Complaint, filed July 24, 1941, in Civil Action No. 54, styled United States of America, Plaintiff, vs. the Crescent Amusement Company, Inc., et al. Defendants, was filed in open Court by verbal direction of the Court, and no written order was signed by the Court directing that said Supplement to Complaint be filed.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid Court at Nashville, Tennessee, this the 17th day of January, 1944.

L. B. Ormes, Clerk. By H. M. Hutchison, Deputy Clerk. (Seal.)

[fol. 16] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENT TO COMPLAINT—Filed July 24, 1941

Plaintiff alleges that since the filing of the complaint herein the defendant exhibitors have continued to combine with each other and with each of the distributors, referred to therein as the "defendant distributors", unreasonably to restrain interstate trade and commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures and the operation of motion picture theatres in the Crescent towns and in other towns referred to in said complaint and bills of particulars filed herein in violation of Sections 1 and 2 of the Sherman Act in the manner alleged in said complaint and bills of particulars and will so continue to combine unless and until relief prayed for in said complaint is granted.

Horace Frierson, Jr., United States Attorney.

Thurman Arnold, Assistant Attorney General, By Robert L. Wright, Special Assistant to Atty. Gen.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DISMISSING COMPLAINT AS TO PARAMOUNT PICTURES, INC., ET AL.—January 3, 1941

Upon the stipulation of counsel for the plaintiff and the defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc., and Twentieth Century-Fox Film Corporation, it is hereby Ordered, Adjudged and Decreed that the complaint be dismissed as to said defendants, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated, RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Vitagraph, Inc. and Twentieth Century-Fox Film Corporation.

Enter.

Elmer D. Davies, Judge.

O.K. O. W. Hughes, Ass't U. S. Atty.

[fols. 18-169] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL ANSWER OF DEFENDANTS—Filed July 7, 1941

The defendants herein, The Crescent Amusement Company et al., having heretofore filed an answer to the complaint in this cause, now come and supplement said answer by averring that the answers made as to the respective paragraphs of the complaint are intended to be in response not only to said paragraphs of the complaint as originally filed, but also as supplemented by several bills of particulars filed by plaintiff herein.

(S.) Geo. H. Armistead, Jr., Attorney, American Trust Building, Nashville, Tenn.

Of Counsel: McConnico, Armistead, Waller & Davis, American Trust Building, Nashville, Tenn.

[fol. 170] [Caption omitted]

[fol. 171] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PROPOSED FINAL DECREE—Filed May 6, 1943

This cause having come on for hearing before this Court upon the pleadings and upon the testimony, both oral and documentary, introduced at the trial of this cause, and the same having been argued by counsel both orally and upon briefs submitted, and the Court having made and filed its Findings of Fact and Conclusions of Law herein on the 3rd day of March 1943:

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusement Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors Paramount, Fox, and [fol. 172] Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(2) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(3) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination with each other for the purpose and with the effect of eliminating, suppressing, and preventing independent competition in the territory in which each operates; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(4) That the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, a corporation, Cherokee Amusements, Inc., Anthony Sudekum, Kermit C. Stengel, and Louis Rosenbaum, be, and they hereby are, enjoined and restrained from continuing in combination [fol. 173] with each other, and with the major distributors, Paramount, Fox, Warner, Loew's, RKO, and United Artists in licensing films for the purpose and with the effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(5) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Cumberland, Rockwood, and Stengel to eliminate its independent theatre competition at Rogersville, Tennessee; and is further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(6) That the defendant United Artists Corporation, be, and it hereby is, enjoined and restrained from continuing in combination with Rosenbaum, Sudekum, Rockwood, and Stengel to eliminate independent theatre competition of Muscle Shoals at Athens, Alabama; and is further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects.

(7) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amuse-

ments, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from creating or maintaining as unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, and Central and Western Kentucky, in which each has theatres.

(8) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is, enjoined and restrained from combining its closed towns with its competitive situations, in licensing films for the purpose and [fol. 174] with the effect of compelling the major distributors to license films on a non-competitive basis in competitive situations and to discriminate against its independent competitors in licensing films.

(9) That each of the defendants, The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, and Cherokee Amusements, Inc., be, and it hereby is enjoined and restrained from coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with it by predatory practices.

(10) That all existing franchises to which The Crescent Amusement Company, Muscle Shoals Theatres, Rockwood Amusements, Inc., Cumberland Amusement Company, Cherokee Amusements, Inc., Lyric Amusement Company, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, Kermit C. Stengel, or Louis Rosenbaum, hereinafter referred to as the exhibitor defendants, is a party, be, and they hereby are, declared invalid.

(11) That all existing agreements not to compete in the future to which any exhibitor defendant is a party, be, and they hereby are, declared invalid.

(12) That each exhibitor defendant, be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation.

(13) That each of the corporate exhibitor defendants, be, and it hereby is, required to divest itself of the owner-

ship of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc., and each such defendant is hereby enjoined and restrained from acquiring the ownership of any stock or other interest in any other corporate defendant, or affiliated corporation, with the exception of Strand Enterprises, Inc.

[fol. 175] (14) That the defendant, Louis Rosenbaum, be, and he hereby is, required to terminate and dissolve the partnership of Muscle Shoals Theatres, and to divest himself of any interest which he may have in any of the corporate defendants, and said defendant Rosenbaum, is hereby enjoined and restrained from acquiring any interest in said corporate defendants.

(15) That the defendant, Anthony Sudekum, be, and he hereby is, required to resign as an officer of any corporation, except The Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except The Crescent Amusement Company, by acting as an officer thereof, or otherwise.

(16) That the defendant, Anthony Sudekum, be, and he hereby is, required to divest himself of any interest which he may have in any of the corporate defendants, except The Crescent Amusement Company, and said defendant is enjoined and restrained from acquiring any interest in any corporate defendant except The Crescent Amusement Company.

(17) That the defendant, Kermit C. Stengel, be, and he hereby is, required to resign as an officer of any corporation, except Rockwood Amusement, Inc., which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except Rockwood Amusements, Inc., by acting as an officer thereof, or otherwise.

(18) That the defendant, Kermit C. Stengel, be, and he hereby is required to divest himself of any interest which he may have in any of the corporate defendants, except Rockwood Amusements, Inc., and said defendant is enjoined and restrained from acquiring any interest in any

[fol. 176] corporate defendant, except Rockwood Amusements, Inc.

(19) That the acts of dissolution described in paragraphs (13), (14), (15), (16), (17), and (18) hereof shall be performed within one year from date of entry of this decree.

(20) That the exhibitor defendants, and each of them, be, and they hereby are, enjoined and restrained from acquiring a financial interest in any additional theatres outside Nashville, Tennessee, except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition.

(21) That the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and decrees as may be necessary or appropriate for the construction or carrying out of this decree, for modification or termination of any of the provisions thereof, for the enforcement or compliance therewith and for the punishment of violation thereof.

(22) That the costs of this action shall be taxed against the exhibitor defendants and United Artists Corporation.

(23) That the Bill of Complaint be, and it hereby is, dismissed as to the defendants Strand Enterprises, Inc., Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Columbia Pictures Corporation, and R. E. Baulch.

Elmer D. Davies, United States District Judge.

Dated this — day of March 1943.

[fol. 177] In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Nashville Civil No. 54

United States of America, Plaintiff,

vs.

Crescent Amusement Company, Inc., et al., Defendants

Order re Objections to Form of Decree—April 20, 1943

On this April 19, 1943, the plaintiff presented a decree for entry in this cause. Objection being made to the form of

the decree by defendant United Artists Corporation and by other defendants, the Court ordered that all objections to the form of the decree as proposed by the plaintiff be submitted to him prior to May 6, 1943, and ordered further that on said date the decree in this cause would be finally settled and entered on the minutes of this Court.

It is further ordered that on said date of May 6, 1943, the Court will hear and determine all motions filed herein by the defendants to amend the findings of fact and conclusions of law filed herein by the Court on March 3, 1943.

Enter: April 20, 1943.

Elmer D. Davies, United States District Judge.

[fol. 178] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

TRANSCRIPT OF ARGUMENT ON FORM OF DECREE TO BE ENTERED ON FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed August 25, 1943

[fol. 179] Thursday, May 6th, 1943.

Appearances:

Robert L. Wright, for the Government.

W. H. Mitchell, for Muscle Shoals Theatres.

Wm. Waller and Geo. H. Armistead, Jr., for Crescent Amusement Company.

The Court: All right, Gentlemen, are you ready to proceed in this matter?

Mr. Mitchell: Counsel for the several defendants, may it please the Court, have conferred about the order and they suggested that I open the discussion with regard to the Muscle Shoals Theatres.

[fol. 180] The Court: All right, Mr. Mitchell, you may proceed.

Mr. Mitchell: May it please the Court, I have filed here some motions or a motion for modification of certain find-

ings of fact that appear on the file and for some additional findings of fact. Those elements of the motion are so plain on the face of it, I think, and your Honor is so familiar with the record that I thought I wouldn't devote any time to that discussion at all.

I discovered, in checking, that there are a couple of typographical errors I want to correct and probably one error as to the facts in the record that I want to correct also before I get to that. But it is my intention to devote a brief space of time, as briefly as I can, considering what is involved, to the item of relief.

The Court: Well, I think we should take up the decree first and then hear any objections as to the findings or requests for proposed findings and amendments.

Mr. Mitchell: Of course, if it were interesting to your Honor and if we had a great deal of time it would be very pleasing to me to go over the findings of fact one by one, but as I said before, the additional findings of fact that I have asked for are practically undisputed on the record, and they are asked for additional clarity, and when put in, I think the record is acceptable from that standpoint, in the [fol. 181] event of any review of the case.

The findings of fact that exist there in some respect, I think, need modification in order to speak the truth, as I see it, but certainly there are substantial elements in the case that I am sure your Honor will be willing to cover because they are—

Now, if I understood you, when you said take up the decree, really it was in my mind to address myself solely to that phase of the decree that touches Muscle Shoals Theatres in the matter of relief.

The Court: Well, you may have a copy of the proposed decree. Do you have it in the file, that was submitted by the Government?

Mr. Wright: What is it that your Honor wanted a copy of?

The Court: I want a copy of the proposed decree that was submitted by the Government. I don't know—was it left with the Clerk? I think the District Attorney had possession of it.

Major Frierson: I have in my file the original.

Mr. Mitchell: (Handed copy of the decree).

The 14th item of the decree corresponds, as I understand it, with your Honor's conclusions of law. I don't dispute that.

[fol. 182] "The defendant Louis Rosenbaum be, and he hereby is, required to terminate and dissolve the partnership Muscle Shoals Theatres and divest himself of any interest which he may have in any of the corporate defendants, and said defendant Louis Rosenbaum is hereby enjoined from acquiring any interest in such corporate defendants."

The Court: Of course, of the corporate defendants that were found to be in the combination.

Mr. Mitchell: I think it is undisputed in the record that Rosenbaum owns no interest in any of the defendants, and that element of the decree is proper but in that requirement asking Rosenbaum to dissolve the partnership and in the Muscle Shoals Theatres——

The Court: All right.

Mr. Mitchell: In your conclusions, and it would follow in this decree, proposed decree, it is declared that your Honor will retain control of the decree for the purpose of doing justice and making modifications from time to time, and that is a sound provision in it, and it is in my mind that on the entire record the injunctive relief that is granted will supply every protection which the Government has sought in bringing this action. We have lost the lawsuit. We recognize that fact and we are law-abiding people and good [fol. 183] soldiers and we are able to travel and work under the conditions and rules as they are.

I think it is plain in this record, your Honor remembers the record well, that this man Rosenbaum has been a successful businessman. He is a man that it was not suggested anywhere that he was a law violator because he never had any tendency of that kind. It is probably plain from the record that if he has violated the Sherman Act, or we may say, since he has violated the Sherman Act that he probably did it without any knowledge that there was such a law, or if he knew there was such a law, as to what the law meant. As a matter of fact, it has been a matter of great difficulty on the part of any lawyer and many times for the courts to know what is a violation of the Sherman Act. It is a matter of recent history that probably one of the big-

gest corporations in the world, the Aluminum Company of America, was indicted for three or four years before Judge Caffey in New York with all the vigor and vehemence that the Government was able to put into it, and a thing that is commonly known as a trust, though Judge Caffey said there was no violation of the Sherman Act involved in it. As far as Rosenbaum and his theatres are concerned, it is a little unit in some little towns in North Alabama. He has built them up and he has made a living out of it, a living that is [fol. 184] very important for a man to have for himself and his family. It is plain in this case, even from the Government's theory, from the Government's claim, that it is rare that his business has ever touched the business of the Crescent Amusement Company or its affiliates. All of our files, correspondence and files, and all the files of the Crescent Amusement Company and its affiliates have been before the Government, such part of them as felt they were interested in were presented to the Court and there has no evidence been disclosed from the ffles of the Muscle Shoals Theatres and the Crescent Amusement Company that there was any particular cooperation or friendship, and certainly nothing that approached collusion or agreement in that.

The only way that was brought out was from the files of the Distributors, those inter-office communications that were presented here by photostats where some Atlanta man would write New York a letter and join the names of Sudekum and Rosenbaum but as to that, much of it that was recited there was misapprehension and not the truth because what was written down was misinterpreted. The man who wrote it could so misinterpret what he had heard or what he knew. Your Honor will also know that those inter-office communications were introduced under a stipu- [fol. 185] lation to which the Muscle Shoals Theatres was not a party and we had a continuing objection in the record on that ground. The Government apparently had misapprehended the fact; it probably believed what they alleged, that Muscle Shoals and the Crescent Amusement Company were the same thing, and that when they had the stipulation of the Crescent that they had a stipulation of Muscle Shoals.

The Court: I remember something about that.

Mr. Mitchell: Well, that is a fact but if you take all these inter-office communications as being the truth, if you just

assume that, and it pleases me—I assume it for the purpose of argument, not as an admission—all that was ever showed was that Rosenbaum came to Nashville one time and negotiated a Fox franchise at or about the same time Sudekum was negotiating a Fox franchise and that someone named Paul Wilson wrote up a memorandum in which he put them all on one deal and Sudekum said they were not dealing—that he had a separate piece of paper for his but that Sudekum, without any authority from Muscle Shoals, hooked the thing on a piece of paper where all those were written out. But that in itself was an isolated item, if all that the Government said was so. That was one item in twenty-five [fol. 186] years in which Sudekum and Rosenbaum had worked together, having a contract down there and a contract up here. Well, that is not a course of business.

Every distributor that got on the witness stand here, one or two of them had worked for three or four different companies—said that Rosenbaum always made his own contracts. He always bought his own pictures. He never bought for Crescent and Crescent never bought for him. The things were totally separated.

I wish to suggest this, may it please the Court, without touching too much in detail. I was trying to illustrate what I think of as the innocence of Muscle Shoals of any intentional wrongdoing with regard to the Sherman Act and to say—

The Court: Let me have a copy of the findings. I just wanted to refresh my recollection as to what I found to be the facts in that respect, the reason I asked for the findings.

Mr. Mitchell: Well, in your findings of fact you refer to that as a joint deal.

The Court: If I recall, Mr. Rosenbaum was in Atlanta when that thing was said to have been done, or might have been said to have been done and he talked with one of the officers down there and then came back to Nashville and [fol. 187] talked to Mr. Sudekum about it.

Mr. Mitchell: That is a fact. Whether it was true of the Fox franchise or the Warner franchise, I am not sure, but it was like this: They said to Rosenbaum: "We haven't even traded with Sudekum and want you to help us trade with Sudekum. You boys are friends." He said: "If I could help any, I would be glad to." There was some talk about prices and he conveyed Sudekum a message. He

either went to see him or telephoned him or something of that order and did intervene at the request of the distributor and brought the two parties to terms. But that had nothing to do with his own trade and he did make his own trade. I don't think there is any dispute about the facts about that, may it please the Court.

I was trying to make the simple point that here is a man of character, a law-abiding man, a respectable man, a man of high standing in the opinion of his neighbors, and if he violated the law did it probably unconsciously and we think a mere suggestion from the Court would probably be enough to hold him in line and certainly an injunction by the Court, a cease and desist order would restrain him. If he were a different kind of man from the kind of man I am talking about; if he were one of these intentional law-violators, one of these persistent violators that needs to be cited for contempt—that will handle him, and since the Court is in [fol. 188] the act of keeping jurisdiction of the case, retaining control over the decree, if at any time when it seems proper to the Court to do it, that you could just put this dissolution proposition down. There is no reason for me to speak to your Honor—your judicial temperament—I think we ought to speak about the judicial attitude and invoke the justice in the case but I have sat in this court in the summer of 1941 time after time before this case would be opened and there would be matters here of convictions on criminal charges, and I was always impressed with what seemed to me to be the very proper reasonableness in the attitude of the Court toward convicted criminal offenders.

Well, here is a defendant that has been convicted in an equity case on an anti-trust charge. It is common practice, not only in this Court but throughout the United States, to put a man on good behavior, under parole, if you call it that, and make him report or check him up, and if there are indications pointing that way, to put on him, at a later time the punishment that is merited by the crime. The old Gilbert and Sullivan version, you know, in one of the operas, let the punishment fit the crime, is a universal rule of justice.

You see, the Government, in filing its bill here and its [fol. 189] suggested conclusions of law, puts in some stock phrases there about relief that can be had under the anti-trust act and that has sometime been granted in severe cases where sound judgment merited it about dissolutions, but the

fact that there is a top punishment that can be inflicted in a case, in any case, criminal or civil, does not mean that of necessity and as a matter of justice that the Court — the duty to write that down. And your Honor knows that well and all of us know that well.

Now, I want to call your Honor's attention to what a pursuit of the proposed dissolution decree would mean in the Muscle Shoals case. We have never presented, never have undertaken to present anything about relief here. As a matter of fact, when we argued the merits of the case, maybe I am quite wrong but it would have seemed to me rather thoughtless and rather silly to say to the Court "Please dismiss this case because it has not made out a case" or "Please find for the defendants because of the burden of proof; the defendants are innocent", and at the same time have undertaken to pre-judge the case for your Honor and to say "If you find us guilty then please fix up this question of relief." I think that if I had undertaken such presentation that your Honor would have said: "Well now, listen; I don't want to think about that now. I want to look at the law and look at the facts of the case and decide the merits of the case. When we get down to relief, [fol. 190] why, let's talk about that then, if any relief is to be granted. Maybe there is not any merit to it and maybe you are just taking up my time for nothing." Now, we have come before the Court for the first time and I think properly for the first time to speak about relief.

Rosenbaum is here ordered to dissolve the partnership. I don't know how a partner can dissolve a partnership. He can stop operations. Rosenbaum is the manager; he could close his houses down and that is a matter of importance to him personally and of importance to the public to have the entertainment going on, picture shows. To close them down would be one way of dissolution and I am sure that your Honor doesn't have that sort of thing in mind.

The Court: No. I suppose the only way that he could dissolve the partnership would either be to make the other partner an offer to buy or sell, and if that were not successful or practical, then it would be necessary to file suit in a court of competent jurisdiction of that county to dissolve the partnership and sell the assets.

Mr. Mitchell: I assume that would be true.

The Court: I haven't particularly pursued that matter. [fol. 191] Mr. Mitchell: I presume that to be true, and then what happens? You get all of the business stopped and you get all over the different objections of court processes and go on into the Courts of Alabama and you get down to the business of a sale and the court officer, the register in chancery, is ordered to sell the property. It is a matter in the Court's discretion as to how the property be sold, whether it be sold for cash or be sold on credit, or whether it be sold for this or whether it be sold for that, and the Court tries to make a sale or the Court does make a sale, and when I say "tries" I mean an adequate sale, because there you have got property in which there is an inventory of probably $350,000.00 in three counties; two theatres on leased property and the other is owned outright. If you sell them in bulk who can buy them? Of course, Paramount, Fox and Warner, they are in the business. They have got theatres; they operate theatres but they are under injunctions and decrees as to this, that and the other. You can't go up and ask them to buy the places, buy this property, because they say: "Oh, no, we will be in contempt of court; we can't buy them."—Then you go to a man named Willby or another named Shien, who is running a big chain and being prosecuted by the Government under the anti-trust laws and you say: "Please come in here and buy this enterprise from us, this investment of $350,- [fol. 192] 000.00" and they say: "We can't come in there; we can't do that. We would be glad to own it but the Government doesn't think well of that and the courts, they are holding us down for a while and we are just not interested." Then who are you going to get? We have got to get a cotton merchant or a banker or some businessman that has no experience in business of this kind to come in and buy this property, and what do they know about running theatres? You go to one of them and try to get $500,- 000.00 or whatever they are worth—they are worth more than that but that is the investment,—but besides that, if he had the money I can't pick up a novel system here and try to go into it and try to do something with it. We are in war times and the business looks good now but I remember how it was beginning in 1929 and 1930, through the years of the depression, and the stuff might just blank out on me and I won't have anything. Of course, I will go to the action that the court produces and I will buy, maybe

I can buy them for a song; maybe I can buy them for one half value or one third value, and you won't have any competition at the sale. Crescent can't buy it because it is precluded by the decree. Rosenbaum can't buy because he hasn't got enough money. He has got a half interest in the property but when you take out the court costs and all that is involved in a dissolution proceeding he just owns a half interest and he would have to borrow the balance and [fol. 193] put a mortgage on the stuff, and what do people do about mortgages? The war is over, we hope, in a minute and he is faced with maybe a depression like we had after the first world war. I might go and ask Roger Babson some questions and the District Attorney and they don't know, but a man of the age and experience of Rosenbaum, who has built up something as a life work, he doesn't like to cover himself up with numerous mortgages that may cost him a life's investment. That is a tragedy. He can't look at that.

Now, if you take the thing that your Honor suggested above a give and take offer, of course, his partner doesn't have to either give or take. You can't make anybody do that, but suppose they were—suppose that was a desirable act and suppose Mr. Sudekum would like to do it, I doubt if the Government—I suspect that the Government would protest to the Court against Mr. Sudekum's purchase of that property because they would say that was collusion between us and Tony Sudekum and the expansion of the Crescent down in that territory was a very vile thing. But if Mr. Rosenbaum bought certainly his partner is not going to sell to him at an inadequate price and he would be covered up the same mortgage, and that is just bad business practice.

[fol. 194] Then we get to another thing, may it please the Court, that is where it is mighty easy, you know, to put something down in a prayer or a bill, just put down some language there that sounds like it is wonderful but when you try to put it into practice the problems are problems of meat and bread and life and death. Let's suppose Mr. Sudekum could buy; there was no objection to it, and Rosenbaum would sell his half interest, what has Rosenbaum got? He has got some dead dollars. You can't do anything with dollars. I mean the banks have got too much money, these dollars; they can't lend money. There are no deals for investment open. You have just got some dollars and a

savings account don't pay any interest. Rosenbaum is a working man who has had one practice all his life, the theatre business. He has got nowhere to go with his money. He is deprived, in a sense, of the staff of life, that is, if he sells.

And here is another thing, the income taxes of this concern were introduced by the Government and even there it is claimed that their income was in the high brackets. Of course, these theatre properties have been depreciated from year to year in value, and income tax returns depreciated down as much as the Government will. let them be depreciated down in order to save income taxes in years that have gone by, and any sale of this property at anything that [fol. 195] approached its market value—and surely it is not interesting to the Government or to the Court to make a man sacrifice his property and sell it at less than a fair price—but to sell it at a fair price will show a great big profit on the original investment there and that profit is income, and being income, taxes at a very high rate will wipe out the proceeds of a sale; just take it away. A man—so far as looking at the income tax problem, a man can buy a farm and it will quadruple in value and there is no income tax on the increase in value but if he sells his farm and converts it into cash, that accumulated profit there, the profit is income and many a man in these days has deferred from selling property that he has owned when it shows a fine profit; he has deferred because he really doesn't get that profit.

All of us like to work for the Government on account of this being war times and everybody has a patriotic pride but it is preposterous in having the Government take out of his pocket a substantial or very large portion of it, eighty or ninety per cent of it, to help pay for the national defense. That is a patriotic duty that the average man has a pride in but our Government hasn't got to the point of forcing people to sell their properties in order to realize profits that are involved in these increased values and thereupon surrender to the Government, in the way of in- [fol. 196] come taxes, a real life's profit. There is no attitude like that in the Government at all. It wouldn't be the Government attitude that would force that, I mean the income part of the Government that would force that on any citizen and not on Rosenbaum, but if through the processes of this Court and the decree in this case he should be forced

to sell and get an adequate price—if he got an inadequate price that is a tragedy—if he gets an adequate price and the greatest part of the price is income, why, it immediately becomes capital taxed against him and he has in his pocket, in the place of a going concern in which he is happy and with which he takes good care of his family, a comparatively small piece of money.

The Court: What about the legal right of the Court to order dissolution of a partnership where only one partner is a party to a suit or proceeding?

Mr. Mitchell: Well, may it please the Court, I wouldn't try to pass on that question. I think Mrs. Sudekum is a party defendant. She was in the original suit and if she has been dismissed, I don't remember it. I appeared for Mrs. Sudekum in the case, Muscle Shoals Theatres, Rosenbaum and Nettie Sudekum as one, Muscle Shoals, whoever the parties be.

[fol. 197] The Court: It was in my mind that she was not a party.

Mr. Mitchell: If it would be a problem I would be glad for it to be a problem but I don't think that it is. She is a party to the case.

It has been impossible for me to figure out any way that Rosenbaum can carry out the proposed operation here without a tragic outcome of his business. The Government itself has deprived him of a market for the property, but to market anything at this time would work an undue loss on it. You can't buy without covering the stuff with mortgages, if you assume that the partners will deal with themselves and that our price would be a satisfactory buying price to him. It is just beclouding the future. I know your Honor knows, and it is common knowledge that debts, bad debts are the tragedy of the world. One of my law professors said to me, said to his class: "Young men, before you leave my classroom let me tell you this, stay out of debt,"—and then he recited the tragedies of his early experience in the law practice in which he had incurred debts because he was accustomed to living in pretty good style and he didn't know any other way to live, and he borrowed money because his credit was good, and he spoke of the hardship it worked on him and his family. It is not just words when you speak of a thing like that. Anybody that walks around [fol. 198] with a big load of debt on him is staring at tragedy all the time.

I say, may it please the Court, that we have lost the lawsuit and we are making no complaint in the world to your Honor about that. This is not the time or the place to speak of such a thing. I am taking the decision as it is and I am saying to your Honor that the injunctive relief that is specified in these paragraphs of this proposed decree are ample to take care of the relief that your Honor wants to enforce. There is an injunction. Let the franchises go—we have no issue with the Court about them. Just mark the franchises off; buy separately; all right; that is just fine. Don't condition your purchases in competitive towns with the distributor being willing to sell at the big price in non-competitive towns. All right, that is just fine. We will take all that. We take all these injunctions that are laid down here that are intended to protect the theory of the Government against anti-trust violations; we take them all and undertake in good faith to carry them out and the Court has every means to require him to report or the Government has every means to investigate and if there is ever developed a situation that is offensive to the Court's idea of propriety in this matter the Court has got supervision of the thing with ample means to enforce, if the time should [fol. 129] ever come when it seems it is essential to accomplish justice and put down a dissolution order, why, put it down then.

I have every confidence,—I mean confidence of man to man—confidence in your Honor's appreciating the gravity of it is what I am speaking of. I really feel like the Government ought to have the same reaction. Of course, all of us are partisans and the Government may not have that reaction.

The Court: Well, I had been under the impression that Mrs. Sudekum was not a party to the suit. I had looked into that question and had made investigation at the same time I was considering the fact that some of the distributors who were named as co-conspirators were no longer parties to the suit but I recall now, as you refresh my recollection. I thought she was a party to the suit. However, she wasn't found to have been guilty of any violation of the Sherman Act in this case.

Mr. Mitchell: Her name never appeared in the record except as a party because she never had anything to do with it. She just draws checks, that is all, a totally silent partner.

The Court: All right, let me hear from the Government about this matter. What do you say about it?

Mr. Wright: If your Honor please, the relief that was granted in this decree as to the defendant Rosenbaum we regard as extremely mild, as in fact——

[fol. 200] The Court: As to what?

Mr. Wright: Very mild.

The Court: How could it be any more severe?

Mr. Wright: We think that the findings of fact that were made would have warranted a decree of actual divestiture, that is, a decree compelling Mr. Rosenbaum to divest himself of theatres in Athens where he had committed unfair practices against Buchanan. Now, this decree merely provided, with respect to this dissolution, that the partnership be dissolved. It didn't prevent him from continuing to operate any of these theatres or the Muscle Shoals business or the taking over of the whole business himself. I assume that is the logical consequence of what is required here, that he and Mrs. Sudekum would dissolve the partnership by transferring all her interest to him. That would, I take it, be the normal consequence of the relief that is decreed here. In other words, all that this says to him is simply that he shall operate that business independently of Mrs. Sudekum and the Crescent interests, in effect, as a protest that he had been doing in the past——

The Court: Of course, that was in line with the principle that I have in mind of dissolving the combination.

Mr. Wright: Yes sir, precisely. As I say, I think your Honor's decree in dissolving the combination, insofar as [fol. 201] Rosenbaum is concerned, does it in the least objectionable way that it could be done, insofar as he is concerned, because he is not restricted in his operations in any way. His business is not affected. He is able to keep it intact. All that is required of him is that he sever his connection with the Crescent interests which he now holds through the partnership with Mrs. Sudekum.

Now, this question of the tax problem here, I think is wholly premature. What the tax liability would be, he thinks would be and how this dissolution would be enhanced and all those things, of course, are matters which I don't think Mr. Mitchell is in any position in argument to speak with any certainty about. I suppose that that wouldn't come up until after the decree of dissolution is entered. Then they have a year in which to accomplish it,

provided any question about the plan failing to comply with the court's intention, I suppose it would be brought in here for a hearing of any inequities that might develop, and could be disposed of at that time, but certainly the problem doesn't even arise until we do have the decree entered which does require Mr. Rosenbaum to disassociate himself from the other members of the combination, and the provisions that your Honor has ordered seems to me would be the minimum required for that purpose.

[fol. 202] Insofar as the Court's power is concerned, as Mr. Mitchell pointed out, the partnership itself is in here before the Court. It is not Mr. Rosenbaum but Muscle Shoals Theatres as a partnership that is present and any decree which your Honor enters is fully able to effect the other partner as well as Mr. Rosenbaum.

The Court: Well, I had been under the impression that Mrs. Sudekum was not a party. I suppose I received that impression by reason of the fact that her name wasn't mentioned hardly through the trial and no charge——

Mr. Mitchell: It never was mentioned.

Mr. Wright: That is right. That is, any evidence, of course, was confined to Mr. Rosenbaum because Mrs. Sudekum was a silent, inactive partner in the business.

The Court: I can't hear you, Mr. Wright.

Mr. Wright: I say the evidence was necessarily confined to Mr. Rosenbaum because Mrs. Sudekum was a silent or inactive partner in the business.

Unless there is some point that your Honor would like for me to discuss on that, I think that is all I have to say about it.

The Court: Well, the argument of Mr. Mitchell rather appealed to me; that it might work an undue hardship on [fol. 203] this defendant and probably the same results could be accomplished by use of the injunction.

Mr. Wright: If the Court please, he points out the injunction doesn't hurt him. He is perfectly agreeable to the other injunctive proceedings because they don't have any present application to him, that is, our requirement that in any conditioning of films because he hasn't got any competition left in those places. All the rest of this relief is, I should say, purely theoretical as far as Mr. Rosenbaum's situation at the present is concerned. The only practical result of any real consequence of this decree,

as far as Mr. Rosenbaum is concerned, is the dissolution provision, which does break up the combination and compel him to operate this business separate and apart from the other defendants. Without that I should say that the decree would be virtually meaningless insofar as Muscle Shoals was concerned.

The Court: No, the injunction would prevent him from buying with Mr. Sudekum or the Crescent in any further film deals, any future film deals.

Mr. Wright: That is true, your Honor. To that limited extent it would perhaps be effective but as long as you permit him——

The Court: After all that is what the complaint is based on, isn't it?

[fol. 204] Mr. Wright: Well, the complaint, of course, is based on that abuse of the relationship between the two companies and is, of course, what led to the filing of the suit, and that, in turn, led to the finding that the law had been violated by Mr. Rosenbaum and Mr. Sudekum in combining their interests. The only question you are confronted with here, as I see it, is purely one of the proper remedy. This relief that is being granted here is not, as I understand it, by way of punishment at all. It is purely remedial: that the purpose in ordering the dissolution was to make sure that the conduct that was condemned in the finding would not be repeated, and the only way that such assurance could be gained, as I see it, is not merely to issue an injunction against repetition of the former conduct in the same manner but to go further and actually effectuate a separation of the two businesses, and that is the theory on which the dissolution was asked and on which, I presume, that it was granted.

The Court: All right. Thank you, Sir.

Now, Mr. Mitchell, you mentioned something about the findings that you wanted—two or three matters that you wanted to call to my attention.

Mr. Mitchell: Yes sir, I do. May it please the Court, on the fourth page—you will have to count it because they are [fol. 205] not numbered. There is an indented paragraph. Exhibit A in the indented paragraph there, the last sentence, I believe, is not sustained by the evidence in the case and I want to amend the proposition by striking out those words. My motion is just to strike that out.

The Court: I don't know that I am looking at the same thing you are. What do you refer to?

Mr. Mitchell: That last sentence.

The Court: All right.

Mr. Mitchell: In the indented paragraph.

The Court: No. 29?

Mr. Mitchell: Yes, sir, the last sentence of that indentation.

The Court: "Athens, Alabama, twelve miles from Tennessee City."

Mr. Mitchell: That is the first part of it.

The Court: "Also the same agreement referred to by which Muscle Shoals took over the Buchanan situation at Athens * * *."

Mr. Mitchell: That allegation is not in evidence in the case at all and therefore is an improper request on my part, and therefore I want to amend the motion by striking out that last sentence.

The Court: What do you say about that, Mr. Wright? What part of the record do you refer to?

[fol. 206] Mr. Wright: This is a proposed amendment of his. I don't know just what the significance of that additional phrase is, if your Honor please.

The Court: You say that if the 29th finding is not struck it should be modified so as to——

Mr. Mitchell: That is right.

The Court: I thought you wanted that last sentence stricken because there was no evidence to support it.

Mr. Mitchell: I am asking the Court to add where it is in quotation marks and indented——

The Court: The general 29th finding of fact?

Mr. Mitchell: Sure. And now I am withdrawing my request of the Court and including in the objectionable language the last sentence because that would be asking the Court to say something that is not in evidence in the case.

The Court: You are asking the Court to strike that last sentence?

Mr. Mitchell: Yes sir. I am offering to amend.

The Court: You want to amend your modification here by striking out that last sentence?

Mr. Mitchell: I do.

The Court: Let it be granted. I didn't understand.

[fol. 207] Mr. Mitchell: Now, if you will turn over to the 41st finding of fact.

The Court: That is relative to Lawing.

Mr. Mitchell: It is my proposed additional finding of fact in my motion. It is not in your record. I have mis-used the word there. I wrote the word "Bama" theatre when I intended to say Plaza theatre.

The Court: All right.

Mr. Mitchell: In the 53rd in my motion I want to strike the last sentence. It is identical with the one we struck a moment ago, and those are the only changes, may it please the Court.

The Court: Now, I thought there was some particular point that you wished to call my attenton to, or some particular request.

Mr. Mitchell: Those are the ones. I trust I have made myself plain on this, may it please the Court, that I have been arguing, those things, because on the other I don't think they are required. I think they will be plain to your Honor. I have tried to be fair with them and I don't see any use of taking up the time of the Court to talk about them. Of course, I am insisting on my motion to amend the findings of fact and to make additional findings of fact, as set out in my motion there but expect your Honor to look at them in open court today.

[fol. 208] The Court: Well, I will have to go over these things and I expect probably will have to—unless there is some particular matter that you wish to call my attention to and wish to discuss; if you do, I will give you an opportunity.

Mr. Mitchell: I don't know of any, and that is very kind of you.

The Court: Well, I am going to consider this request as to the modification of the decree on behalf of Mr. Rosenbaum. Of course, what the Court had in mind in the conclusion was to sever all relations between the Rosenbaum theatres and the Crescent circuit. However, I am not ordering dissolution of any Crescent corporations or affiliated corporations. I don't know that I should go so far as to single out Mr. Rosenbaum and order a dissolution of the partnership in his case. I am rather impressed with the request. I will pass on it.

All right, now, do you wish to take up the next?

Mr. Armistead: I reckon I had better come up next, your Honor.

The Court: All right, Mr. Armistead.

Mr. Armistead: May it please the Court, I am not here this morning to discuss our proposed findings of fact. We have the matter of the Government's proposed decree and I want to get some further instructions from your Honor in regard to that, and also make some suggestions to your Honor, which I believe will accomplish the purpose that the Government has in mind.

[fol. 209] Of course, under Rule 65 of the new rules, the injunction must be specific enough that the party being enjoined may know just exactly what the limitations are or to what extent the injunction goes, and I will discuss that later on.

Now, if your Honor will turn to Paragraph 1 and Paragraph 10—Section 1, Paragraph 10——

The Court: In the decree?

Mr. Armistead: In the proposed decree submitted by the Government, you will find that the defendants Crescent Amusement Company, Muscle Shoals, etc., "be and they hereby are enjoined and restrained from continuing in combination with each other and with each of the distributors Fox, Paramount and Warner in making franchises for the purpose and effect of maintaining their monopolies and preventing independent theatres from competing with them."

Now, Section (10) provides "That all existing franchises to which the Crescent Amusement Company, Muscle Shoals, etc., are parties be and hereby are declared invalid." Now, those were franchises and this matter of franchises throughout this whole trial was stressed by the Government, and as I understand it, there were three things the Government claimed which made these franchises invalid. I don't get the contention of the Government to be that a franchise in and of itself per se is illegal but these particular franchises were illegal for this reason, first, they contained a repeat clause; second, because of clearance; and third, because they extend for a particular length of time, that is, too long a period of time.

[fol. 210] The Court: I am of the opinion, regardless of what the Government contended, that the franchises of this sort are per se illegal and are contracts in restraint of trade, and that is what I tried to hold.

Mr. Armistead: Well, the Government claimed that we have got too many of these franchises; that we took up all

the product and just so the competitor would have the right to three of these major companies, three out of the eight, that that would be enough product for him, but they took the position that we have had four or five franchises and we had too many of them.

Now, here is the suggestion I have to make in regard to the franchises, that each year there shall be a re-negotiation in regard to clearance. In other words, let them have a franchise, then that provision in that franchise relative to clearance; let it be taken up each year because there might be some fellow who wants to get in some nearby town and if this provision, if it remains in full force in that franchise, it would naturally affect the operation of his theatre.

Now, second, the repeat run clause. Your Honor will recall that a repeat run clause is where you have an option to re-show a picture. In other words, when they buy these pictures they may get fifteen or twenty of them in all and they don't know which ones are going to be good. It may turn out that there is one outstanding picture. Well, the [fol. 211] exhibitor wants the right to repeat that run in the future and makes that contract to start out with because if it wasn't in there then the distributor would just charge any kind of price he wanted or it wanted to the exhibitor for the privilege of re-showing the picture.

Now, we will say this; here is my suggestion in regard to that provision; that if any competitor enters any of these towns where the exhibitors are now operating theatres that then the repeat run clause becomes automatically stricken from the contract.

The Court: Well, if that is your position in the matter what is the use in putting it in there at all then?

Mr. Armistead: I want it in there until somebody does come in.

The Court: You want it in there to keep them out and when they do come in you will take it out?

Mr. Armistead: No, I want it in there so that I won't be subjected to exorbitant demands on the part of the distributors for the exhibition of that feature picture, outstanding picture in this particular theatre.

The Court: No, I can't be sitting down here as a Court telling the Crescent Amusement Company every few months or every few weeks or every few days what they can do

and what they can't do under this contract. I don't think [fol. 212] it is contemplated that the Court should do that and I don't propose to do it. What I propose to do is to decide this lawsuit and, if possible, get rid of it. If it is necessary to retain it in court for one or two little things, why, I will have to do it. I don't want even to do that, because I don't want to sit down here and act as a moderator between the Government and the Crescent Amusement Company and have this thing coming up continually and that thing coming up. That is not my purpose. My idea is to decide the lawsuit and get rid of it and not sit here and act as a referee all the time. I don't anticipate with any degree of pleasure at all any feeling on the part of Crescent or anybody else that they feel like they have to come down here and get my consent before they can do anything. I want them to be able to decide those matters for themselves. If they are right, all right; that is all right; if they are wrong, then that is a different matter.

Mr. Armistead: What I had in mind was to make these suggestions now relative to any decree, which could be embodied in the decree. The franchise in and of itself is not illegal. Crescent will only be allowed in any situation outside of Nashville to make franchises with only two of the [fol. 213] big five, big distributors, and in those franchises there must be those provisions that I have just referred to, namely, in regard to clearance and in regard to repeat runs. Now then——

The Court: Before we get away from that, Mr. Armistead, that brings up this other question that has been mentioned in the case before that is embodied to some extent in the consent decree that was entered in this case in New York,—now, I don't have the question before me and I didn't intend to decide that—was whether the Crescent monopolized the market for these films by having franchises with any given number of distributors. I just held as to all the distributors that they did have a franchise with that that constitutes a monopoly in restraint of trade. I don't think it is incumbent upon me to say that it would not be a monopoly or restraint of trade for them to have franchises with only two or with three. Now, I had a more definite idea about this franchise proposition and was more specific in my findings in regard to the franchises, whether it is made clear or not in the conclusions, that these franchises in themselves are, per se, absolutely contracts in restraint

of trade and counsel were enjoined from executing any more like them, and that is all I am holding and that is all I am——

[fol. 214] Mr. Armistead: I am not complaining about that in the least, I really am not, but what I want to know is whether or not we could—and I mean by "we" Crescent—make a contract with a distributor and then not be subject to being cited for contempt of court because that question is up right now and I told them "You hold off of that thing until I get a little advice."

The Court: All I can say is that you can't make any more franchises like those you have made. I am not ruling in advance on what some other franchise might be or might not be.

Mr. Armistead: Just like your Honor stated a while ago, I hate to take up so much time discussing this particular point but really it is rather important for my client to know how to be guided in the future. In other words, I don't want to be coming down here—I wouldn't think of it—every few days and saying "Here is a franchise, will this be all right?" Why certainly not. But if I know in advance that—I mean that your Honor doesn't hold that franchises, that all franchises are illegal, then I will know how to proceed.

Now, there are two things I understood from the Government in arguing this case and the proof all the way through here. You have got clearance in it; that is one side, and you have got this repeat run in here. That is reasonable but you have too many franchises.

[fol. 215] The Court: In those things to tie up films for five years; that is another proposition.

Mr. Armistead: That was two franchises. I am not arguing with your Honor about that at all but whether we are right or wrong about it——

The Court: I don't see that the injunction in this case would prevent you from making a regular film contract for another year, and I am not making any particular holding as to clearance or matters with reference to the repeat run. In other words, I am not laying down any rule of conduct that the distributors and exhibitors shall follow from now on. All I am saying is that these franchises in themselves are illegal per se and contracts in restraint of trade. Now, if you make any other kind I might have to decide that

question when we come to it, like Mr. Mitchell suggested awhile ago.

Mr. Armistead: All right then, according to your Honor's ruling then that knocks out paragraph 1 of the Government's proposed decree.

The Court: Knocks it out?

Mr. Armistead: Yes sir.

The Court: What do you mean?

Mr. Armistead: "That the defendants, The Crescent Amusement Company, a corporation, Muscle Shoals Theatres, a partnership, Rockwood Amusements, Inc., Cherokee Amusements, Inc., Lyric Amusement Company, Inc., and Kentucky Amusements Co., Inc., be, and they hereby are, enjoined and restrained from continuing in combination with each other and with each of the distributors Paramount, Fox, and Warner in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them; and are further enjoined and restrained from entering into any similar combinations and conspiracies having similar purposes and objects."

[fol. 216]

The Court: Here is the 10th conclusion of law:

"The franchises entered into between the co-conspirators, Paramount, Fox and Warner, and the defendant exhibitors are contracts in restraint of trade or commerce among the several states, tending to perpetuate the monopolies of the defendant exhibitors involved, foreclosing competition by independent exhibitors, with the defendant exhibitors in the licensing of film over large areas and for long periods of time."

Well, I just think that all that would be necessary would be to enjoin them from further violating the Sherman Act. It is not necessary to mention the franchises or anything else. I have held in here what one of the violations was and then if they want to make other franchises, why, as the old saying goes, sufficient unto the day is the evil thereof. We will wait until that time and see whether they have violated the Sherman Act.

[fol. 217]

Mr. Armistead: The only thing, it looks like to me that that Section 1 should be clarified now so that we will know whether or not——

The Court: I have clarified that. I don't see that it needs to be any further.

Mr. Armistead: All right, Sir, we will strike that one out then.

The Court: Let's see what Mr. Wright has to say about that in a few minutes.

Mr. Wright: Well, if your Honor please, the purpose of conclusion or Section 1 is to give effect to the conclusion of law that is expressed in your conclusion No. 10. That simply follows the precise language of that conclusion and the additional conclusion 19, that the plaintiff is entitled to the injunctive restraint indicated herein, from continuing said conspiracies in restraint of trade and commerce and from entering into any similar combinations or conspiracies for similar purposes and objects.

Now, all that this paragraph 1 does is insert in the decree the injunction that your Honor decided the plaintiff was entitled to in conclusions of law Nos. 10 and 19. [fol. 218] Again, this particular provision was not prepared by us as one which we thought granted by any means the maximum relief to which we were entitled under the findings in the case. We say that under the findings that were made that we would be entitled to a decree which would flatly prohibit the making of franchises with these distributors by these defendants because of the manner in which they had abused the privilege in the past, but it seems that your Honor had clearly not intended to go that far. You had in your conclusion of law No. 10, had this limiting language——

The Court: Well, if they make any other franchises in the nature of these they certainly would be in contempt of court and violating the Sherman Act too, wouldn't they?

Mr. Wright: That is right. A provision as this one is now, so qualified, I would say that any violation of that injunctive provision, that is, the making of these franchises with the distributors with the purposes and effects that are prohibited by the Act would, in effect, mean a violation of the Act also, but that in itself, of course, does not deprive us of the right to the relief we are entitled to; that is, we are entitled to have that additional contempt section imposed there inasmuch as they have already violated the Sherman Act in this matter, and next we are entitled to an injunction prohibiting further violations which would [fol. 219] make them liable for contempt, as well as for any other proceedings that might occur under the Act.

The Court: Don't you think that just simply the decree saying that the defendants are enjoined from further violating the Sherman Act in any manner in the future as they have been held guilty of doing in the findings and conclusions would be sufficient?

Mr. Wright: Well, I take it that that substantially is what was done in this decree and that it was merely spelled out with somewhat more precision than that by simply taking the conclusions of law and putting them into this protective or injunctive provision to show what was covered. I would suppose that the complaint upon their part against the injunction as being vague or indefinite would probably be insisted upon by them if that method had been adopted instead of the method that was adopted of tracking the Court's conclusions in the prohibitory paragraphs of the decree.

The Court: I see, you were just endeavoring to make it broad enough, is that it?

Mr. Wright: I beg your pardon.

The Court: I say you were just endeavoring to make the decree sufficiently broad to cover any situation that might arise?

[fol. 220] Mr. Wright: Well, no, if we wanted to make it broad enough to cover any situation it would simply be a prohibition against making franchises with these distributors. That would be our idea of a properly broad paragraph. This paragraph is slightly restricted by the requirement there of not only making of the franchises but making them with a particular purpose and effect. Now, those qualifications are in there not for our benefit but those are in there for the benefit of the defendants.

The Court: In other words, you say that so long as they can make franchises which don't have the purpose and effect of maintaining their monopolies to prevent independent theatres from competing with them that those franchises, of course, would not be prohibited by the Act?

Mr. Wright: They wouldn't be prohibited by paragraph 1. I think the Act is broader than paragraph 1 of the decree, as it is drawn. That is my contention. And when I say limit the language in paragraph 1——

The Court: Well, according to your theory then, just limiting the injunction to enjoin them from further violating the Sherman Act would be broader than paragraph 1.

Mr. Wright: I think it probably would, yes. Suppose

they would object to it on the ground, that it was too broad, too vague and indefinite.

[fol. 221] The Court: Well, you have to have some basis for the issuance of an injunction. Of course, I couldn't enjoin them from doing anything that they haven't been doing, as I see it. I don't know but what Mr. Wright may be right about it. It may be better for you to leave it in there. What do you think, Mr. Armistead?

Mr. Armistead: Well, I don't think so, your Honor, because I think that the defendant is entitled to know whether or not, if he does make a franchise—now, I understand if they make franchises similar to any franchises before made, as brought out in this record, that then this defendant will be in contempt of court and that contract will be illegal and void, but I do say it looks like to me that the defendant would be entitled to know if it makes a franchise which does not contain these evils which the Government contended were contained in those other franchises that then it would be all right.

The Court: Well, it may not contain those evils but might contain other evils and it would have the same effect of maintaining monopolies to prevent independent theatres from competing with them and you would still be violating the injunction.

Mr. Armistead: May I use this illustration?

The Court: Yes sir.

Mr. Armistead: Your Honor will recall that in the buying seasons the distributors and exhibitors lots of times couldn't [fol. 222] get together. Suppose they got together in the middle of the season and Crescent will go ahead and say: "Yes sir, I want this year's product and I want the ensuing year's product. I want to get a selection out of both of them." Now, according to the contention of the Government, as I catch it, that would be a franchise which would be illegal. I want to find out things like that because I don't want to be cited down here every time——

The Court: The only franchises that I think that would be the basis for the issuance of an injunction in this case were those franchises—I think there were those from three to five years, the provisions that those had. I didn't mean to hold that a contract for one year's product was a franchise; that that was illegal. I certainly didn't mean to do that. And I don't think I did.

Mr. Armistead: No sir, your Honor didn't. You didn't.

The Court: Well, I don't understand your question then. I thought you said you were concerned about making a contract for half a year's product.

Mr. Armistead: Plus the ensuing year's. In other words, getting the benefit of two years product, selection from two years' product if I didn't make a contract, say, until in the middle of the season.

[fol. 223] The Court: I haven't decided in this case that a two years franchise is invalid.

Mr. Armistead: That is right. That is the reason I wanted this section 1 or paragraph so that I can tell whether I do have a legal right to enter into a franchise or contract.

The Court: Well, you may not have the legal right—you may have the legal right to make such contract as that and you may enter into such a contract and it might be a violation of the Act but not a violation of the injunction because the injunction is based upon the findings and conclusions in this case. Do I make myself clear?

Mr. Armistead: Yes sir.

The Court: It could be possible for you to make such a franchise and that franchise could violate the Act yet it wouldn't necessarily violate the injunction that I have issued because my injunction is based solely on my findings and conclusions. Anything outside of that, why, I couldn't consider and couldn't act upon, and certainly you wouldn't be in contempt for doing something that has not been covered by either.

Mr. Armistead: Now, if your Honor will turn to section 2 of the plaintiff's proposed decree and that is about—the defendants are enjoined and restrained from continuing in combination with each other for the purpose of dividing [fol. 224] the territory in which theatres may be operated by any of them, etc. That, in our opinion, is notice to the—in other words, here is Cherokee and Rockwood, two separate corporations, who operate in, your Honor recalls, East Tennessee. Now then, Rockwood also operated down here in West Tennessee close to Crescent towns. Must Rockwood confine itself to East Tennessee or Crescent confine itself to Middle Tennessee? I just don't know.

The Court: You don't expect me to construe the decree beforehand, do you, in this case?

Mr. Armistead: Yes sir.

The Court: I see you do.

Mr. Armistead: I just want your Honor to lay down rules for me so I can obey them. I sure don't want to get in the wrong town or have Crescent getting into the wrong town.

The Court: Now, what was your question, Mr. Armistead?

Mr. Armistead: By dividing, and, of course, we don't—it doesn't charge, the conclusion of the Government, that the territory has been divided—we don't argue that. What I am trying to find out about is "the purpose of dividing the territory in which theatres may be operated". Rockwood and Cherokee both operate close to each other. Does that mean that one of them has got to get out of that territory? And Rockwood also operates down here in West Tennessee close to where Crescent operates.

[fol. 225] The Court: Well, let's see what Mr. Wright's construction of that is. What is your construction?

Mr. Wright: If the Court please, I would say that the obvious purpose of this paragraph is not to confine any of these defendants to any particular territory but to encourage them to compete with each other in every territory that they can find. There is certainly no restriction there on any defendant moving into any territory he pleases. All this prevents them from doing is to agree to stay out of each other's territory.

The Court: From getting together and saying they will stay out of each other's territory?

Mr. Wright: Absolutely.

Mr. Armistead: May I ask counsel, is it the contention of the Government that we will have to get out of some of these towns or can they stay in the same towns they are in?

Mr. Wright: Certainly this paragraph No. 2, as I read it, doesn't tell any defendant to get out of any town. It tells them to stay in there and compete wherever he can.

The Court: This happens to mean any agreement that is made after the entry of this order, Mr. Armistead.

Mr. Armistead: Well, we are enjoined though from continuing.

The Court: You are enjoined from continuing in combination with each other for the purpose of dividing the ter-[fol. 226] ritory. That is, if there are divisions, of course, it would seem to me.

Mr. Armistead: If there are not, we can stay where we are now without violating this injunction?

The Court: I would think so.

Mr. Armistead: May we add such provision to the decree?

The Court: You can submit——

Mr. Armistead: I am submitting to counsel——

Mr. Wright: If the Court please, the purpose of this decree, as I understand it, is to tell these people what they can't do. We didn't try the suit to give them what would be the permissive rights here.

Mr. Armistead: We are entitled to a standard to know how to be guided in the future.

The Court: All right, you can submit what you think would protect you in the case. Do you have it ready?

Mr. Armistead: There is no objection to section 3. That was the one we were just talking about—I mean no objection to 2. Nos. 2 and 3 are the same practically about dividing the territory. No, I am wrong. No. 3, I haven't discussed that yet.

Now, No. 3 is also vague and indefinite, your Honor. These defendants named therein are enjoined and restrained from continuing in combination with each other for the purpose of and with the effect of eliminating, [fol. 227] suppressing and preventing independent competition in the territory in which each operates. And are further enjoined and restrained from entering into any similar combination or conspiracy for similar objects and purposes. Well, that similar purpose and similar objects—I don't see what they are referring to there.

The Court: Referring to the combinations that are set out in the findings and conclusions, I assume.

Mr. Armistead: Will your Honor indulge me while I get it?

The Court: Yes, sir.

Mr. Armistead: Now, section 4, on which there will be the same ruling—the only objection is when you get to the words "for the purpose and with the effect of maintaining their theatre monopoly". We have a monopoly in each town where there is only one theatre.

The Court: I don't know that there is anything we can do about that, but if somebody comes into that town and opens up a theatre, the only effect that I could see that the injunction would have would be to prevent the Crescent from then putting in effect against that competitor such practices as they have engaged in in the past. We can't just move a motion picture theatre in one of these towns where you have a monopoly to keep you from having a monopoly. I

don't think it refers particularly to monopoly as to one particular town.

[fol. 228] Mr. Armistead: May I speak to counsel just a moment, your Honor?

The Court: Yes sir. (Conference.)

Mr. Armistead: May it please the Court, if your Honor will refer to section 4 again.

The Court: You mean paragraph 4?

Mr. Armistead: Paragraph 4, yes sir, right after the words: "United Artists licensing of films for the purpose of and with the effect of maintaining their theatre monopolies". If your Honor will not object to the elimination of the words "Maintaining their theatre monopolies", I think that our suggestion that these words be stricken will not be opposed.

The Court: That wouldn't make sense, Mr. Armistead, to strike the word "maintaining". It would read that "Crescent, Rockwood, etc. are hereby enjoined and restrained from continuing in combination with each other and with the major distributors, Paramount, Fox, Warner, RKO and United Artists in licensing films for the purpose of and with the effect of their theatre monopolies".

Mr. Armistead: Of preventing. You see it reads "Maintaining their theatre monopolies", and those words come out and just keep that "with the effect of preventing theatres from competing with them—"for the purpose and with the effect of preventing."

The Court: You wish to strike out the word "maintaining"?

Mr. Armistead: "Their theatre monopolies".

[fol. 229] The Court: And insert in lieu thereof "prevent"?

Mr. Armistead: No, it will read all right and be coherent then.

The Court: "For the purpose of and with the effect of preventing independent theatres competing with them"?

Mr. Armistead: That is right.

The Court: What do you say about that, Mr. Wright?

Mr. Wright: Why, as your Honor indicated, I think, to me they mean the same thing, substantially, as maintaining, and the other would consist of preventing independent theatres from competing with them. I take it that the intention there is co-extensive. I don't see that it makes a great deal of difference whether you strike out those addi-

tional words or not, except for the sake of consistency inasmuch as we have attempted to follow the exact language of the conclusions of law all the way through here. I would prefer to see it stay in there.

The Court: Well, I was thinking about the result that would come from the change. Now, they are enjoined from continuing in combination with the distributors in licensing films for the purpose of and with the effect of maintaining their theatre monopolies. Of course, that applies to the present monopolies that they now have. Of course, it may be said that if they would enter into a contract this month with a distributor for a two year franchise in a certain town where they had no competition and that next month [fol. 230] an independent theatre would come in and open up and find that this franchise had been made, of course, the Government would say that those films have already been licensed to enable them to maintain their monopoly and are violative of that injunction. I assume something of that order is what they may have in mind.

Mr. Wright: Well, if that is what they have in mind we would, of course, object to the elimination of the provision but we would certainly contend that if that was done that would also come under the prohibition there that follows, preventing independent theatres from competing with them. I take it that such franchise of that kind would also have that effect. That was the theory on which I said it didn't make any difference but if they feel there is something prohibited by the one phrase that is not prohibited by the other then I think they both ought to be in there.

The Court: Well, Gentlemen, we can't presuppose every situation that might arise under the decree, one of this kind, and you can't make provision for it. You can change this decree a thousand different ways in order to cover some situation that you think might arise and then put the decree down and some situation entirely different from what you thought about would be the first thing to arise. Now, in a situation of that kind, such as I mentioned a few minutes ago, where contracts of that nature had been executed as to [fol. 231] whether or not it would be violative of the injunction would depend entirely upon the facts that are presented about the matter. If the Government thought that such a situation as I mentioned was violative of the injunction they would bring the proper proceedings; I would see the facts. If I found the facts to be that when those

contracts were entered into Crescent had no idea that they would have such a position, that there was no purpose of maintaining monopolies or preventing this competitor from coming in, in the execution of those contracts, I would say, of course, they haven't violated the injunction but if I should find even that the contracts were for one year or six months; that they had been executed for the purpose of maintaining their monopoly and preventing independent theatres from operating with them, why then, I would find that they did violate the injunction. It is a question of fact. You can't presuppose every situation that might arise about these matters. All right.

Mr. Armistead: May it please the Court, it is not just shortly before 12 o'clock and I believe I can save some time, in view of what your Honor has said——

The Court: That is just an expression of my idea, Mr. Armistead. I might be wrong about it. I thought I would give you the benefit of my thought.

[fol. 232] Mr. Armistead: That is right. If your Honor don't mind, I wanted to adjourn now so I could discuss it with counsel.

The Court: We will adjourn until 1:30.

Afternoon Session

Court convened at 1:30 p. m. when the following proceedings were had:

The Court: All right, Mr. Armistead, you may proceed.

Mr. Armistead: May it please your Honor, I hate to take up so much of your Honor's time in discussing this decree, these provisions which we think are ambiguous but we feel it is rather important to us. If your Honor will turn to section 7 of the plaintiff's proposed decree. We feel that should come out because it is absolutely ambiguous. Now, what is an "unreasonable monopoly of the business of operating theatres"? That, in substance, just means to say don't ever violate the law any more. You are enjoined from violating the law.

The Court: Well, of course, in some of these towns they have a monopoly now. I wouldn't construe that this means that they had to close up picture shows and go out and hunt some competition or something like that. What do you say as to the necessity of that, Mr. Wright?

[fol. 233] Mr. Wright: Why, this paragraph, if the Court please, was put in there to make effective your Honor's conclusion No. 9 (a) where you said that each of these defendants that are named in this paragraph violated the Sherman Act in the following manner:

(a) Creating and maintaining an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, Northern Alabama, Central and Western Kentucky in which each had theatres."

Now, I take it, that that violat-*ng* having been found, we are, of course, entitled to an injunctive provision specifically directed at that violation. That is what this paragraph 7 does.

The Court: Well, of course, that applies to a monopoly looking at it as a whole, as I see it.

Mr. Wright: I assume that from its express terms. Now, there again, as far as more specific relief is concerned, we would prefer a decree which told them to get out of certain of these towns in which they had committed unfair practices and maintained an unreasonable monopoly and ask for divestiture of theatres.

The Court: That would take them out of most of the towns.

Mr. Wright: A very substantial part but, as I say, the job we attempted to do in the present decree was to present a decree that we thought was required by your Honor's de-[fol. 234] cision rather than one that *that* represented what we though the relief ought to be. We merely incorporated in there the relief that we understood your Honor had ordered in the findings and conclusions of March 3rd, so that whatever vagueness there is in there is again in there as a protection to the defendants and does not confer any benefit on us.

The Court: I can't restrain them from creating a monopoly because it has already been created.

Mr. Wright: While that is necessarily true, there still are spots in this territory that is referred to here, Tennessee, Northern Alabama, Central and Western Kentucky, in which they haven't yet created a monopolistic condition, which they might in the future, if they follow the course of conduct that was pursued in the past. I suppose that is the purpose of having the word "create" in there as well as "maintain."

Mr. Armistead: If your Honor will turn to paragraph 20—don't you think that takes care of the situation? "That the defendant exhibitors and each of them be and they hereby are enjoined and restrained from acquiring any financial interest in any additional theatres outside of Nashville, Tennessee except after an affirmative showing before this Court that such acquisition will not unreasonably restrain competition".

[fol. 235] The Court: Well, it is questionable in my mind that I ought to put that in there. That is the thing this morning that I had in mind that I would have liked to have avoided. Why do you say that should be left in there, Mr. Wright? In paragraph 20?

Mr. Wright: Which paragraph are you referring to?

The Court: Paragraph 20.

Mr. Wright: Well, paragraph 20 again was put in this decree in order to comply with conclusion of law No. 20 of your Honor's decision.

The Court: Yes, sir, but I am not entirely satisfied in my own mind that I should have had that in the conclusion. I adopted that from the proposed conclusion which you submitted but what is the necessity for such a provision?

Mr. Wright: Well, the necessity for the provision lies in the fact that the decree's purpose is preventive and the only way that you can make it effective from the standpoint of preventing a recurrence of situations that have been condemned by the findings is to insist that before these defendants move into another situation that the matter be presented here.

The Court: Do you mean that I sit down here and supervise from now on the activities of the Crescent Amusement Company as to whether or not they should open up theatres in other towns?

Mr. Wright: Oh, not at all. I assume that the purpose of this is to prevent an expansion by the Company and whether [fol. 236] there would be any occasion to use that proviso would be entirely up to them. If they were content to remain in the same places, the same size territory, there would be no occasion ever to resort to this Court, but certainly, in view of what has happened, there ought to be some prohibition against further expansion on their part.

The Court: Well, wouldn't they be entitled to extend their business so long as they didn't violate the Sherman Act?

Mr. Wright: No. In view of the history that was shown

here, I would have said again that we were entitled, on the basis of these findings, to a flat prohibition against further acquisitions. This is a qualification again, which, it seems to me, is for their benefit.

The Court: That wasn't what you asked for. You asked for just exactly what was put in here. I followed this (indicating) in doing this (indicating). This was adopted from your conclusions that you submitted.

Mr. Wright: Well, that may be but I say, it seems that qualification there brings out, that makes a possibility—that is in there for their protection.

The Court: Don't talk about what you are entitled to but what you asked for because you didn't ask for what you might have been entitled to in that respect.

[fol. 237] Mr. Wright: I agree that this is what we asked for but I say if there was a question in your Honor's mind as to whether or not you ought to be subjected to the necessity of having to review such applications as might be made to go into new situations that the cure for that is not the elimination of the provision but to simply say flatly that they shall not be allowed to expand into other towns. That, it seems to me, is the answer to the particular problem that has been raised rather than to just say "We won't have any such provision."

The Court: What legal objection would there be to them expanding as long as they didn't violate the Sherman Act? How would the Government be interested?

Mr. Wright: Well, they already have violated the Sherman Act in expanding and I think the court has so found.

The Court: You wouldn't say that, in itself, was a violation of the Sherman Act. You have to look at all these matters as a whole.

Mr. Wright: That is right.

The Court: That is just one of the circumstances incident to the violation.

Mr. Wright: Well, I take it that the circumstances under which they did expand were these violations. By the elimination of competition, by the methods that they used, they violated the Act, and having done so, there should, it seems [fol. 238] to me, be a clear provision which will prevent a recurrence of that sort of thing.

The Court: Well, wouldn't an injunction prevent a recurrence?

Mr. Wright: I think clearly it would.

The Court: I wouldn't be entitled to just enjoin them from expanding at all as long as that expansion had nothing to do with violating the Act.

Mr. Wright: I don't think your Honor can say that expansion would have nothing to do with violating the Act when all the evidence that has already been presented here—we have facts that their expansion in the past has been a violation of the Act, therefore, you enter a decree which, you say, will check that and prevent future violations of that character.

The Court: No, I don't agree with you. I don't find that the expansion by itself alone was a violation of the Act.

Mr. Wright: Well, again assuming that the findings that you made were based upon all the evidence in the case, of course, the fact remains that a violation has occurred and as a result of that violation the Government is entitled to impose certain restrictions on these particular defendants. They are not to be treated at the end of this lawsuit, a proved violation, just like anyone else who would come in fresh without any violations, and what your Honor is saying, as I see it, in effect, is that you should not do anything [fol. 239] to these defendants that you wouldn't do to people who had never been before the Court.

The Court: Wait a minute. I said that I thought I put that in the conclusions but I don't see it in the conclusion. I recall that you had it in the——

Mr. Wright: It is in conclusion No. 20, if your Honor please.

The Court: Oh, yes, I see it.

Mr. Wright: In the last four lines.

The Court: You say it is in 20—I don't see it in 20. Wait a minute—yes, I see it now. Is there anything else you want to say about this, Mr. Armistead?

Mr. Armistead: No, your Honor, there is not.

May it please the Court, this thought occurs to me. Suppose, for instance, we will take Clarksville, Tennessee, because it looks like this injunction is going to be in effect for a pretty good while. If one of these theatres at Clarksville gets dilapidated or burns down and Crescent wants to put up another theatre, I don't think that this injunction would or that it is the intent of your Honor to enjoin Crescent from constructing another theatre in Clarksville in the event one of its theatres becomes so old it had to purchase another lot and put another theatre up there.

The Court: No, I don't think so. From a theoretical [fol. 240] standpoint this order dissolves the monopoly and any monopoly created there must be a new monopoly. It depends, as I said awhile ago, on a question of fact, it seems to me. It seems to me it would be sufficient to say that they are hereby enjoined and restrained from maintaining an unreasonable monopoly. I am not quite able to get the logic of the situation because, as far as a monopoly is concerned, it has already been created, this particular monopoly, and that, you say, was what you had reference to in the conclusions. Well, they might be enjoined from creating any new monopoly. I suppose that is what it would have to refer to because I can't enjoin them from doing something they have already done.

All right, what is the next one, Mr. Armistead? I am ready to pass upon this.

Mr. Armistead: Your Honor, suppose we skip section 8 because I want to discuss that with section 22; they are both rather similar.

We will come to section 11, and if your Honor will turn to your findings 30 and 31. Now, that is on pages 18, 19 and 20 of the printed copy. Now, as I understand section 30 or finding 30, your Honor has held that those restrictions on account of—I mean those agreements not to compete are rather unreasonable, but now in 31 your Honor has found that "in addition to the aforementioned agreements [fol. 241] the following non-competitive agreements were narrowly limited in area, were taken from the exhibitors indicated at the time their theatres were acquired."

Now, my inquiry at this time is whether or not your Honor holds those agreements referred to in section 31 of the findings are illegal. I am particularly interested in that because there is an agreement we had there with John D. Henry in connection with the theatre at Hickman, Kentucky and if that is turned loose and that agreement, along with similar ones, are held unreasonable we will meet Mr. Henry tomorrow morning with another theatre he will want to sell.

The Court: Yes, I think all those agreements, when construed as part of the purpose of building up a monopoly, would be invalid.

Mr. Armistead: Well now, may I make this inquiry then: suppose we take those agreements separately. For instance, I don't want John D. Henry to be used as an illustration and come here and say: "The Court has already held

the agreement you have with me is illegal and invalid and I am coming on back into town and I am going to sue you."

The Court: That is a matter that would have to be tried out with Mr. Henry in a separate proceeding, as I see it. I couldn't bind him by any ruling that I would make in this matter.

Mr. Armstead: But you are binding Crescent. What I [fol. 242] am trying to dodge there, as your Honor can readily see, and the probabilities are there will be a good many treble damage suits growing out of these agreements. I am not arguing about 30 but I am about 31 because they are limited in area and time.

The Court: Well, I would say that conclusion No. 20 covered all of them.

Mr. Armistead: Your Honor, if you will look on page 19, your Honor has found at the bottom down there—that is section 30—"Each of these agreements not to compete with Crescent or its affiliates in other towns extended far beyond the protection of the business being sold, and demonstrated a clear intention to monopolize theatre operation wherever they or their affiliates secured a foothold."

Now, there is no such finding in connection with section 31 and your Honor, I judge, predicated your conclusions in regard to those agreements on section 30 by just parenthetically mentioning there were other competitive agreements—non-competitive agreements obtained but they were limited in scope.

The Court: That is true. They were limited but they played their part in the whole scheme.

Mr. Armistead: Well, would your Honor object to the decree being modified then, and we so suggest that each of these agreements mentioned in section 31 in and of itself is not declared to be illegal or intended to be held or to be [fol. 243] declared illegal?

The Court: No, I didn't hold that.

Mr. Armistead: I asked *if* would your Honor have such provision entered into the decree.

The Court: I have no objection if the Government has none.

Mr. Wright: Well, if the Court please, we certainly object to it. What he is talking about now is modification of your Honor's decision rather than the decree here. The conclusion in No. 20 clearly provided for the invalidation of all of these agreements, and the decision seems to us clearly right

insofar as it held that all of those agreements not to compete were executed as part of a scheme to monopolize, and therefore, they were all invalid.

Mr. Armistead: That is not so found; that is not contained in the findings. The only thing contained in the findings in regard to that were those mentioned in section 30.

The Court: In the findings?

Mr. Armistead: Yes, your Honor.

The Court: Well, there was just more emphasis put on the ones in section 30 than there was on those in section 31. While they were not as broad in scope, didn't they give the protection that the others might have had as they played their part in the whole, and although a limited part, should [fol. 244] be looked to as a whole?

Mr. Armistead: I catch your Honor's ruling as to that. I am not going to argue that point any longer but I was trying to get this in the decree, that your Honor didn't hold and does not hold that any particular one of those agreements, in and of itself, is illegal and void.

The Court: Well, that is something different. In and of itself I don't think it would be illegal and void. An agreement not to re-enter business within a certain time, agreements of that kind where a business is sold by one person to another, are frequently made and in and of themselves are not objectionable, but as far as the Sherman Act is concerned, when viewed as part of the whole thing in building up a monopoly, it is objectionable, is only what I intended to say, and whatever I would say about this matter would not be binding in a controversy that you might have with Mr. Henry or anybody else about their business because if Henry took steps to go ahead and open up business in violation of, or in what you would consider a violation of his agreement, and you file suit in the chancery court to enjoin him from violating his agreement, that court would hear the facts. It might very well say: "Well now, as far as the decision of the United States Court in this matter holding that the agreement was invalid in concerned, that [fol. 245] was viewing that particular agreement as part of the whole monopolistic scheme and was not binding on Mr. Henry, of course, in any way. He was not a party to the suit, and while it may have been invalid in that respect, yet this court can see nothing objectionable about the agreement. Such agreements are made every day and this Court

finds that Mr. Henry should be compelled to abide by his agreement." I think the Court could very well take that position.

Mr. Armistead: Now, Your Honor, in regard to section 12, which is practically the same as section 8, which we skipped; "That each exhibitor defendant, be, and hereby is, enjoined and restrained from conditioning the licensing of films in any competitive situation outside Nashville, Tennessee, upon the licensing of films in any other theatre situation."

We would like to add this, in addition to that: "Nothing herein provided shall be construed to prohibit any exhibitor from licensing films in competitive situations from the same distributors from whom films in other of their situations are licensed, it being the intent of this paragraph only to prohibit and make illegal and void any agreements or side agreements, express or implied, to make the deal for the competitive situation contingent upon the deal for the other situations."

In other words, the defendants don't want to run the [fol. 246] risk of being cited for contempt of Court when they have two or three situations in one place and in another place they have a competitive situation and they want to buy films on a competitive basis from the distributor wherever this competitor has the same opportunity as the defendant exhibitor has, but they don't want to be placed in the position of saying "you can't buy from that distributor because you bought from him for your other situations in towns where you don't have any competition."

The Court: H[illegible]e you a copy of that, Mr. Armistead, that you just read?

Mr. Armistead: I will give your Honor this one. (Handing paper to the Court.)

The Court: Is that the only one you have got?

Mr. Armistead: Yes sir.

The Court: I will look it over and then I will show it to Mr. Wright.

Mr. Armistead: Mr. Waller informs me that we have already sent Mr. Wright a copy of that and also your Honor.

The Court: Well now, let me see. (Looking through papers.) I received a memorandum from you but I haven't received any proposed copy of decree.

Mr. Armistead: It was hitched onto the back end of that memorandum.

[fol. 247] The Court: Well, he must have forgotten to hitch it because it is not hitched on here.

Mr. Waller: We will get your Honor another copy of it.

The Court: Suppose I hand this to Mr. Wright.

Mr. Wright: I have found it. I think I have the same thing.

The Court: What do you say about that?

Mr. Wright: It seems to me, your Honor, that it rather confuses rather than clarifies the provision that is already in there. I don't see how that helps any insofar as certainty is concerned. This last—I would say down to the point, take the first phrase—"Nothing herein shall be construed to prohibit any exhibitor defendant from licensing films in competitive situations from the same distributors from whom films in other situations are licensed—"

Well, obviously there is nothing on the face of the prohibition that would do any such thing. It seems to me to rather cloud the issue to put a qualification like that, in that, that plainly is not within the prohibition anyway. Then, when he goes on to say "It being the intent of this paragraph only to prohibit and make illegal and void any agreement or side agreement, express or implied, making deal for the competitive situation contingent upon the deal for the other situations."

[fol. 248] Now, that elaboration there, it seems to me, would complicate rather than simplify that prohibition. I take it that what is intended here is to prevent the conditioning of the licensing of films in competitive situations upon the other situations, and that prohibition should prevail whether conditioning is accomplished by agreement or side agreement or in any other manner. It seems to me the intent of the paragraph is perfectly clear from the statement as originally written, and that this additional contributes nothing but confusion.

The Court: I am inclined to agree with you on this, Mr. Armistead, if you can make it a little clearer to me. I just don't quite understand what you have in mind.

Mr. Armistead: I don't think all the provision there in 12—I think that ought to have the express provision to the effect that if the exhibitor has a théatre in one town where there is competition and he has several theatres in another town where there is no competition that it wouldn't

be in violation of this injunction if he buys in this competitive town from the same distributor that he purchased pictures from in the other towns.

The Court: I wouldn't think he would be unless it was conditioned upon the licensing of films in the other situations.

Mr. Armistead: I don't think it would either but I wanted to be sure about that. You see, your Honor, I don't want [fol. 249] to get cited down here for contempt of court.

The Court: Well, I don't think you are going to get cited.

Mr. Armistead: Now, your Honor, I haven't got much longer to talk. I said I was going to—well, I have got one paragraph that we want to put in here right at the first and it is this: "The injunctive relief granted the plaintiff in the foregoing paragraph——

The Court: Which paragraph?

Mr. Armistead: Right after paragraph 12, I am going to add another one: "The injunctive relief granted the plaintiff in the foregoing paragraph is not intended to prohibit, and shall not be construed to prohibit, acts or agreements in the conduct of the defendant's business of a character not specifically herein found illegal in the findings and conclusions of the Court in this case."

The only reason we want that put in there is that will protect the defendants from being cited for contempt of court in this case on facts thus far. They may in the future do something innocently and would be subject to an independent anti-trust suit. In other words, your Honor has said, as I caught it, two or three times that what you mean by this injunction is, for instance, coercing, predatory practices, and that means just exactly as found in the findings of fact and that would define all these other sections of the injunction.

[fol. 250] Your Honor has, for instance, referred to similar combinations and conspiracies several times. I say your Honor—I mean this decree, this proposed decree. Now then, what your Honor was referring to, as I caught from the remarks of your Honor this morning, was to the findings and conclusions that your Honor has already found in this case.

The Court: Well, the basis of the injunctive relief is the findings and conclusions and I assume that in order for any violation of the injunction to occur, the act would have

to be of the same nature or same class as these matters that have been before the Court and passed upon by the Court.

Mr. Armistead: That is the main thing I wanted to find out, your Honor, in regard to that. That takes care of the situation. Now, your Honor has stated this morning——

The Court: Suppose you let me have that proposed amendment.

Mr. Armistead: I will have it written out on the typewriter.

The Court: Before we pass from that, do you wish to have anything to say on that, Mr. Wright?

Mr. Wright: This last is apparently the same thing, now, your Honor. I take it that last provision you read is not in the decree. It is attached to your memorandum?

[fol. 251] Mr. Armistead: No.

Mr. Wright: I would say that that was quite a drastic modification of the Court's decision. The decision, as I understood it, was intended to prohibit not merely the precise repetition of precise acts by which they had violated the decree but, of course, included the doing of similar acts.

The Court: I said similar acts or acts of the same class.

Mr. Wright: Yes sir, but I say his proviso here quite clearly opposes not only what your Honor just stated now but what was in the decision and what I understood the practice is with respect to all of these decrees. All of those that I have seen always prohibit similar violations, as well as repetition of the violation, in the precise form in which they occurred.

Mr. Armistead: I will have this typed and hand it to your Honor.

Now, in discussing the balance of this proposed decree, we respectfully submit that the Government can accomplish everything on earth that it wants to accomplish by restraining the defendant from unreasonably interfering with interstate commerce, or, just, in substance, provide, as it is provided in section 12 of the decree and section 8: "That each exhibitor defendant be, and hereby is, enjoined and restrained from conditioning the licensing of films in [fol. 252] any competitive situations outside of Nashville upon the licensing of films in any other of their situations."

Now, if that is done that means that any competitor in any country town or city or any town where Crescent or

any of these other defendant exhibitors operate, that that man has got just as much chance of buying his pictures from the distributor at the same price as Crescent has or Rockwood or Cherokee because Rockwood and Crescent and Cherokee are enjoined from telling the distributor: "Now, here, if you don't sell me for this town over here where I have competition I won't buy my films from you for towns where I haven't got competition."

The Court: Why shouldn't he have that right?

Mr. Armistead: The exhibitor?

The Court: Yes sir. Why shouldn't he have the right to buy films just as cheap as Crescent or anybody else?

Mr. Armistead: Why, he should have that right.

The Court: I understood you to say that it would mean if this man goes in there that he wouldn't have the right, implying that he should not have, and I asked, why shouldn't he.

Mr. Armistead: No. I didn't mean that he wouldn't have the right but what the Government was contending in this case, as I understand it, is, for instance, for Crescent to say: "If you don't sell me for Paris, Tennessee I won't [fol. 253] buy pictures for the circuit" and the independent in Paris wouldn't be able to buy pictures because the distributor would go ahead and sell Crescent in Paris, for instance, so that he could get to sell to all these other towns. This injunction prevents anything like that from being done.

The Court: I think that it should be prohibited.

Mr. Armistead: I am not arguing with your Honor about that at all. No siree, I am not saying that is wrong; no sir, I am not saying that at all but I am saying that is the way to break up this alleged monopoly.

The Court: Oh.

Mr. Armistead: Without the necessity of Crescent selling any stock it has in any other corporation. Now, the decree provides that there must be a divestiture; that Crescent must sell all the stock it has in othef affiliated corporations, and the same way with Rockwood and the same way with Cherokee.

Now, Crescent had a fifty per cent interest in Cumberland and Lyric and Nu Strand. By the way, your Honor, the case was dismissed as to Nu Strand.

The Court: I wouldn't consider that that would apply in that case because that corporation wasn't found guilty of violating the Act.

Mr. Armistead: Crescent owns a half interest in Lewis-
[fol. 254] burg, Shelbyville, Strand Enterprises.

The Court: Didn't I make an exception in these findings in that respect?

Mr. Armistead: As to Strand Enterprises. But Nu Strand didn't exhibit any pictures up there at Kingsport. They had the three buildings up there and leased them to Willby, I believe, or somebody like that.

Now, if Crescent, for instance, has to sell its stock in the Lyric down here at Huntsville, Alabama, it would work a great hardship not only on Crescent but on the heirs at law of Mr. C. A. Crute. Mr. Crute did all the buying for Lyric, which only operated three theatres, until his death in 1939 and then Mr. Sudekum took over the buying, and the Crutes, his interest in these theatres is owned by the young married daughter and a son who is not yet twenty one years of age. Neither one of them knows a thing on earth about how to operate a theatre. Now, Crescent though must sell its stock. To whom, I don't know whether they are in a position to buy or whether they are not in a position to buy and your Honor doesn't know. There is no proof to that effect, and, as was held in this recent case of the Pullman Company where they tried to dissolve the Pullman Company—anyhow, they held in that case that if the Court was of the opinion that proof was necessary to be introduced in order to allow the court to be in position [fol. 255] to say whether stock in a certain corporation should be sold in order to accomplish certain purposes, that that could be done. As was said in this Pullman Company case, recently decided: "On the other hand, we do not mean to be peremptory regarding the appropriate decree. Counsel for both sides are entitled to be heard with regard to its form and it may be that such testimony to some of the points will be helpful. If so, we don't want to say in advance that we don't wish to hear it."

Now, Your Honor doesn't know the condition of this Crute family down there and I respectfully submit—I am not trying to testify, but I do submit that it would work a great hardship on them because there is no proof in this case that they know anything on earth about the purchase of films.

The Court: I think the only reason Lyric was retained in the matter was on account of the franchise.

Mr. Armistead: That is exactly the reason your Honor held it in there. They were not guilty of predatory practices. There is no proof in the record that they ever intended to expand. Your Honor said that you held them in the case because—this is not your Honor's exact language but it is the substance of it—because they were included in the franchise.

Now, we are enjoined from making any franchises like [fol. 256] we made in the past and it would certainly work a hardship on them to have to see their stock sold. On the other hand, their interests would certainly be affected if your Honor ordered a dissolution between Crescent and Lyric.

Now, let's take the Cumberland Amusement Company, for instance. Crescent owns half of that stock. All the film buying for Crescent or for Cumberland was done by Oldham and Mr. Hill, prior to his death, prior to the time he sold his interest. Cumberland never was included in any franchise, never did have any franchise, and the only thing on earth that Cumberland ever did, so far as this record goes, is going up here to Rogersville, Tennessee and opening up a theatre, building a theatre and opening it up, and it sold that theatre a year and a half before this case was ever brought; sold it to Rockwood.

Now, you come to Rockwood and Cherokee——

The Court: They are the ones that had the building with United Artists up there, aren't they?

Mr. Armistead: Yes sir, a year and a half before the suit was brought.

Now, you have Cherokee and Rockwood. There is a situation and the only proof in the record thus far in regard to that is what Hendren testified to; that he and Parrott were broke when they sold out and formed this new [fol. 257] corporation.

Now, I feel sure that the proof will show that these gentlemen are not in a financial position to buy Rockwood's interest in Cherokee. The thing to do in regard to that, it appears to me, is this: let Hendren go ahead and do the buying for Rockwood and Cherokee and Mr. Stengle, for instance, and Mr. Sudekum can buy for Crescent and Lyric and Oldham continue buying for Cumberland. Now, both of them, all four of these defendants are enjoined from

conditioning the purchase of any films in competitive situations on the buying of films where there is no competition.

Now then, another thing, may it please the Court, suppose Rockwood just goes ahead and sells all of its stock, and Cherokee operates up there in those little mountain towns. It costs money for overhead and Rockwood would have to have separate overhead and Cherokee would have to have separate overhead, but the Government's purpose would be accomplished if these little old theatre corporations could go ahead and have one buyer and one manager, but if that stock has to be sold I don't know who will buy it.

Now, about these affiliated corporations, if Crescent must sell all its stock——

The Court: Apparently, from what you say, Mr. Armi- [fol. 258] stead, they wouldn't be able to get along as well independently as they did as part of the combination.

Mr. Armistead: That is exactly right. That is just exactly right; they can't. They can have one overhead, one manager for both of these theatres, whereas if they have them separately, why, it is going to cost each one just that much more. There is no need of my getting up here and I am not going to argue that Rockwood and Cherokee, if they stand together up there, will have a better opportunity of serving the public and managing the theatres than if they were divided up.

I am not arguing now in the least they have got to have any connection. I am not asking that there will be any connection between Cumberland and Rockwood and Cherokee on the one part, or Crescent and Rockwood and Cherokee on the other part, but this whole case can be solved by enjoining these corporations: "Cumberland, you buy for yourself and don't buy a picture in a competitive place conditioned upon the fact that you will get that picture in your non-competitive situation", and that same thing will apply to Crescent.

The Court: Well, that may be true but if there is no financial interest, one in the other, the temptation will be less on those officials to do those things.

Mr. Armistead: Still they can't though. I am suggest- [fol. 259] ing that Mr. Hendren do all the buying for Rockwood and Cherokee and Mr. Stengle wouldn't have anything to do with them. He will do the buying for Crescent. That is just one suggestion I have to make to see that this decree is carried out.

Now then, you take the opinion in the case of this Aluminum Company. It is said: "It is elementary that the relief granted by this Court, sitting as a court of equity, must be equitable and not penal or punitive in its nature and must be designed to prevent a repetition of the thing which the Court has found to be illegal."

Now, the Court has found in this case that films were purchased by some of these corporations, some of these defendant exhibitors and taken away from competitors, or at least the competitors didn't have an opportunity to buy them simply because they say: "Here, if you don't sell us in all of our situations we won't buy in any of the situations."

The Court: Well, I felt that I had been rather lenient in the nature of the relief granted in this case. Apparently Government counsel seem to think or have the idea, and if I had followed their request and wishes and actions in the matter I would not only dissolve the combination, but I would have dissolved all these corporations and then you would have——

Mr. Armistead: And fired all the lawyers. The Govern-[fol. 260] ment, they are after us too hard, your Honor.

The Court: I am inclined to think you got off a little lighter than you seem to think.

Mr. Armistead: I really don't. I just don't see how we can gain anything on earth by Crescent having to sell its stock in the Cumberland Amusement Company. There is a corporation there that does its own buying, that is not included in any franchises, and the proof, the uncontradicted proof shows that Cowan Oldham did the buying, and what would they gain by having to sell stock out of this poor little Lyric down here at Huntsville, Alabama?

The Court: I am inclined to listen with some degree of receptivity to what you have to say about this.

Mr. Armistead: Well, your Honor, I can't tell you anything without getting outside the record.

The Court: Why didn't you file a petition in this case about this matter?

Mr. Armistead: I thought your Honor said you didn't want to see us down here much.

The Court: No, I didn't say that. I said if you had any matter to present that there was any merit in I would be glad to hear you.

Mr. Armistead: Now, in regard to this provision in the decree, would your Honor let me read you just a moment [fol. 261] about this Great Lakes Towing case, about where they asked for a dissolution in that case and the Court said no. It says:

"In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not substantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means . . .

"Unless for such means, purposes, and practices, the size alone of such combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business."

And again:

"The towing company is before the court and subject to [fol. 262] its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate such abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest."

Now, what will be accomplished by having Crescent sell its stock in the Cumberland Amusement Company? They are not buying any pictures together. They would be enjoined from combining with each other to purchase any pictures. They never did belong, have franchises—the only thing on earth, I repeat, that your Honor found that Cum-

berland did was to go up here at Rogersville a year and a half before this suit was brought and erect a theatre and sell it.

We take the Kentucky Amusement Company——

The Court: Well, they put one man out of business there. They sold it to another affiliate.

Mr. Armistead: Not at Rogersville. They sold it to Rockwood. As a matter of fact, they weren't doing any good.

The Court: I say they sold it to an affiliate, Rockwood.

Mr. Armistead: Not the Cumberland.

The Court: Well, indirectly, I would say.

Mr. Armistead: You see, your Honor, Mr. Miller was the [fol. 263] independent and he didn't sell it until a long time after that and he stated at the time the only thing he turned over to them was just the keys of the town.

You take the Kentucky Amusement Company, for instance. Your Honor provides here and this decree provides that they must sell, Rockwood must sell its interest in the Kentucky Amusement Company, which is a fifty per cent interest in it. Well, as a matter of fact, the Kentucky Amusement Company, that fellow Hobbs up there owes over $20,000.00. He can't buy it and the Kentucky Amusement Company owes about $50,000.00. Now, if Rockwood has got to sell that stock I don't know how it is going to get along, and that is certainly a case where the proof would not justify the decree in providing that Rockwood sell its interest in the Kentucky Amusement Company.

I know your Honor stated awhile ago that maybe if they were divorced entirely, that is, Cherokee and Rockwood, just as an illustration, that they might get along a little better, but I want to make this suggestion that if your Honor sees fit to adopt that course that I have suggested, namely, that we be enjoined from conditioning the purchase of pictures in one place upon the sale of them in another place, to give a test period on that of two or three years and if the Government finds out we are violating anything in this [fol. 264] then they come on down here and they can ask for more relief and your Honor certainly will be justified in granting it.

The Court: I don't want to hear all this lawsuit again. What do you say, Mr. Wright?

Mr. Wright: With respect to the limited divestiture, the relief that was granted in your Honor's decision as it is incorporated in the decree, the argument that was made on the basis of the Great Lakes case, I take it, was already won by Mr. Armistead when your Honor concluded that it was not going to be necessary to dissolve the Crescent Amusement Company, but when you decided that you felt that you could grant the relief that was appropriate merely by ordering it to sell its stock that it held——

The Court: Dissolve the combination.

Mr. Wright: —of these other companies. Precisely so. There is no way, as there was in the towing case, of taking the company apart and distributing its assets among any other persons. Now, insofar as this divestiture relief that your Honor did grant is concerned, that seems to me to be the minimum by which the decree could be made effective. That says that these people shall no longer divide the territory. Any decree which would restore at all competitive conditions that previously existed between Crescent and [fol. 265] these companies that it acquired would have to necessarily compel Crescent to dispose of its stock that it has acquired in the course of eliminating that competition between them.

The Court: I was just speaking with reference to Lyric now. There is a little company down there that no complaint was made about any of their transactions in this case, whether competition or monopoly, and the only way that they appeared in this case was in some of the film deals where they were put in the franchise along with Crescent and some of these others.

Mr. Wright: Yes sir, but I take it, if your Honor please, the basis for the relief or your order compelling Crescent to sell its stock in Lyric is not predicated against Lyric at all but that is not dependent on any showing that Lyric did anything.

The Court: Of course, it is not but it might have that effect on some people who have not been guilty of violating the Act.

Mr. Wright: Now, of course, the question of whether anybody is going to be hurt or not is something that I don't think can be decided on Mr. Armistead's argument. The theatre there in Huntsville seemed to operate before Crescent came in there and I don't think your Honor is

justified in, would be justified in assuming that the theatres there couldn't be operated by the Crute family without assistance of Crescent or without Crescent owning a half interest in them. Any assumption such as that would, of [fol. 266] course, defeat any attempt to divest Crescent or any of these other companies of any interest they have in theatres. I think that is quite in the scope of unreality to assume for a moment that these companies that Crescent has got into or these theatres that they came into could not be operated as they were before Crescent came into the picture. I take it that the objects and purposes of the divestiture that was ordered is to restore a competitive situation as it existed prior to the time Crescent came in and took over this half interest, which enabled them to split up the territory with these people and to make these franchise deals.

Now, with respect to Cumberland, it is not correct to say that they have had nothing to do with the franchises. With respect to the Warner franchise particularly, Cumberland was a party to the original agreement that was made and the testimony with respect to Miller and Warner shows that at the time the Warner product was sold away from him to Cumberland the Atlanta exchange manager wrote him and told him that they were not able to negotiate with him because they had made a deal with the entire Sudekum circuit, and the Sudekum circuit deal or the Crescent deal was, of course, a deal made under the old franchise.

Now, to the extent that affiliated corporations are con- [fol. 267] cerned in this divestiture we assume, and I think Mr. Armistead assumes too, that you only intended to refer to those affiliated corporations which were involved in the finding of violations, that is, those which were either involved in the franchises or in the division of territory, and in order to make it perfectly clear that there was no intention to include a number of other corporations which, as far as I know, appeared in the case only in the answer to interrogatories, I prepared a revised final page of that decree and I supplied Mr. Armistead a copy of this, which expressly eliminates those affiliated corporations which do not appear as having been involved in any violations. That was done by adding paragraph 19, which reads as follows: "Wherever reference is made in this decree to affiliated corporations such reference shall not include the

following corporations". Then are listed thirteen corporations which the interrogatories showed that Crescent had an interest in but which are not involved in the findings as violations that your Honor made.

The Court: Let's see that. (Handing paper to the Court).

Well, of course, that is correct because some of them were not even mentioned in this lawsuit, as far as that is concerned.

Mr. Wright: The only place in which they appeared was [fol. 268] in the answers of the defendants, defendants' answers to interrogatories which disclosed these other interests about which no evidence was introduced.

As stated before, I don't think that the defendants are in any position to object to this divestiture or have any standing here before your Honor and object to it on the ground that it is not going to be fair to or is going to injure these other people who owned the other half of these businesses. I take it they are perfectly able to speak for themselves and if they have any objections or are going to sustain any damage here as a result of what the Court is decreeing they will always have an opportunity to come in and be heard, but insofar as the question here is concerned, it is a very narrow one of what shall be done with these defendants that are before the Court and clearly they have no standing to object to that on the ground that someone else might be adversely affected.

In connection with this question of vagueness, I would like to read to your Honor what Judge Woolsey had to say in another motion picture case, the case of United States vs. First National Pictures. That was one which went to the Supreme Court and this is the opinion of Judge Woolsey on the entry of decree after remand by the Supreme Court. That decree found the conspiracy illegal, which had been [fol. 269] tied up with the formation of these credit bureaus, which the industry had employed, how it was referred to in the contract that was made. The decree enjoined and restrained them from, individually and collectively carrying out the conspiracy and then he said: * * * "or further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the purpose or effect similar to said conspiracy", from doing any act or thing whatsoever having the same purposes or effects as the

acts done in the conspiracy. He said a conspiracy to promote or tending to promote any purposes and effects thereof.

Complaint was made that those provisions were vague and uncertain and here is what Judge Woolsey said about that at page 554 of 57 Fed. (Sec.). (Reading).

Now, the provisions of the decree that I read here and the provisions that have been incorporated here with respect to similar combinations or conspiracies are stock provisions which have been incorporated in a number of decrees, and I can run through some of them if you wish but I don't want to bore the Court by referring to those similar provisions unless you feel that it is necessary, but I can assure you that those provisions are very common and have been repeatedly used in substantially the same form that they are incorporated here.

Now, with respect to the necessity for the limited di-
[fol. 270] vestiture that was granted here, in addition to the other injunctive provisions we, of course, would never have spent the time or taking up the time of the Court and offered the volume of evidence that we did here as to what had happened with respect to these defendants over this period of time if all that we expected to come out with was simply a warning to these defendants not to violate the Sherman Act again. The purpose of building up that record was to show exactly how they had reached their present position of dominance and the monopolistic and illegal means they were using to achieve it.

Now, of course, the record is very clear that in the course of building this monopoly up, for all practical purposes, competition was virtually eliminated and it is almost nonexistent today in any place where these defendants operate. Now, having brought that situation about they are not the ones to complain that this relief, which is necessary to grant in order to achieve any practical result in the situation, is going to cause hardship to them because you have created conditions under which competition will again be possible. The fact that they have so completely eliminated it as to make that relief necessary is entirely their responsibility and there is no reason whatsoever for any objection on their part based upon the character of this relief.

[fol. 271] I think it is clear that, of course, they would be delighted with a decree here which did nothing more

than to remonstrate with them not to violate the Act any more and leave them in full possession of the monopoly that they have illegally acquired, but obviously such a decree would not meet the situation in any respect or apply the remedy that the Government is entitled to under the law and the facts of this case.

The Court: Well, we will take a little recess at this time.

(Recess.)

The Court: Do you wish to take up any other phase of it?

Mr. Waller: Yes sir. If your Honor please, Mr. Armistead did not discuss paragraphs 17 and 18 of this proposed decree, and I want to say a few words about it, as to how it would apply to the individual defendant, Mr. Stengel.

Now, the findings of fact or rather the conclusions referred to Mr. Stengel in his official capacity as an officer of three corporations, Rockwood, Cherokee and Kentucky, and the final paragraph of the conclusions states that the individual defendants are to resign as officials of any affiliate corporations. Now, in preparing this decree the Government and or the plaintiff has construed that to mean that Mr. Stengel can stay as an officer of Rockwood but that he can't have anything to do with any other corporation. [fol. 272]. Now, Mr. Stengel, as the proof showed and found by the Court also, assists Mr. Sudekum in Crescent. Now, frankly, Mr. Stengel—and this is, of course, out of the record because there has been no proof as to what will happen to these different corporations or these different individual defendants, but I think it is proper to state what might be shown if there were evidence on this point—that he might prefer to remain as an assistant to Mr. Sudekum in the Crescent Amusement Company rather than to have anything to do with Rockwood if Rockwood is to be shorn of Cherokee and these other affiliates for the reason that would leave a sort of little bob-tailed corporation that wouldn't justify his entire time.

The Court: The only thing I had in mind in that connection was preventing any one officer of any company being an officer of an affiliated company, and as far as the company that he chooses to remain with, it was my idea that he could take his choice.

Mr. Waller: That is what I had in mind.

The Court: It is immaterial, as I see it, which one he remains with just so long as he is not an officer of any of the rest of them. What do you say about that, Mr. Wright?

Mr. Wright: I think that is probably right, your Honor. I assume that, of course, on the basis of the proof that the Rockwood Company was the one which Mr. Stengel had [fol. 273] developed and was associated with.

The Court: Of course, he had been the prime mover in the affairs of Rockwood and probably would. I don't mean to require him to stay with that company.

Mr. Waller: Of course, as long as Rockwood has these other affiliated corporations where he can handle such various matters jointly for them, that is one proposition, but if you only have the little Rockwood with only a few theatres in it, that would make a different proposition. What I had in mind there that this decree perhaps should not specifically tell these individual officers of the corporations what they ought to do but should be predicated or directed against the corporations as was done in the Pullman Company decision, which Mr. Armistead referred to. There they said: "We see no necessity for orders directed against individual defendants by name where corporate practices are forbidden or ordered. The usual inclusion of corporate defendants, and their directors and officers is sufficient without mentioning individual defendants by name." In other words, just enjoin a defendant corporation and their officers and agents from doing such and such things.

The Court: Well, that is true but these officers were made individual defendants in this case.

Mr. Waller: Well, they were in this case (referring to Pullman Company case). It says "individual defendants". [fol. 274] Conditions change; people get old and change their interests and corporations employ new men. What might be feasible today may not be feasible tomorrow.

I just wanted to call your Honor's attention to those paragraphs in the decree.

The Court: Do you have a proposed substitute for them?

Mr. Waller: Well, it is not that merely——

The Court: Gentlemen, you are specifying these things to do. That is what this hearing was set for.

Mr. Waller: We did present a form of decree. We compiled it and sent it to your Honor. We sent a copy to Mr. Wright.

The Court: I don't see anything mentioned in that respect.

Mr. Waller: It is in paragraph 5 of our proposed draft of decree toward the end. We ask for a trial period, and I want to mention that again about the plan of divestiture—"would require the defendant Sudekum to resign any office he may hold with any defendant exhibitor corporation other than Crescent Amusement Company and require the defendant Stengel to select one defendant exhibitor corporation in which he shall hold office and resign any offices he may hold in any other defendant exhibitor corporations."

That is paragraph 5 of the draft that we had submitted.

[fol. 275] The Court: I think the same thing would apply, wouldn't it, relative to the interests owned by these defendants? You have here "The defendant Stengel be and is required to divest himself of any interest which he may have in any of the corporate defendants except Rockwood Amusements." He may prefer not to keep his interest in Rockwood Amusements; I don't know. He may prefer to keep this interest he has in the Crescent Amusement Company, I have no objection to that.

Mr. Waller: I don't think this paragraph 21 of your Honor's decree requires that. I don't understand it to. I mean these conclusions, paragraph 21 of the conclusions.

The Court: (Reading) "* * * and requiring the individual defendants found guilty of violating the Sherman Act, to resign as officers of any affiliated corporation, and requiring the defendant Rosenbaum to terminate and dissolve the partnership of Muscle Shoals Theatres, and requiring him to divest himself of any interest which he may have in any of the corporate defendants."

That doesn't cover any but the defendant Rosenbaum. They have a paragraph in this proposed decree relative to Mr. Sudekum in that respect to, paragraph 15, no, No. 16. I don't see that that is specifically covered by the conclusions.

Mr. Waller: No, it is not.

The Court: What do you have to say in that respect, Mr. Wright?

[fol. 276] Mr. Wright: The conclusion makes it specifically on the defendant. While neither defendant is mentioned

by name the requirement of divestiture says "require him", apparently referring to the defendant Rosenbaum.

The Court: Yes.

Mr. Wright: However, we assume that the treatment your Honor intended was to be uniform as between all three defendants and the defendant corporations; that the purpose of it was to insure complete independence of management and control as between all these corporate defendants that were involved here and Muscle Shoals, and, of course, the only way in which that could be accomplished was to apply the same relief that was directed here specifically as to Mr. Rosenbaum to Mr. Stengel and Mr. Sudekum. That was the reason why that was done.

The Court: Well, no, the situation was different as to Mr. Rosenbaum. I don't know that Mr. Rosenbaum—I don't recall now whether the record shows Mr. Rosenbaum has any interest in Crescent or any of its affiliates; I don't think it does.

Mr. Wright: I don't think he has but I take it the purpose of this provision was to be sure that there were no inter-locking interests there held by individuals such as Mr. Rosenbaum or through corporations. That, as I understood it, is what your Honor had in mind in that final re- [fol. 277] quirement that appears there. That is, I assume that your Honor was interested in seeing that the separation would be made complete not only with respect to the ownership of stock by one corporation in another but also by prohibiting the dominant stockholder—that would be Mr. Sudekum—from holding an interest in the other corporations. As far as—taking Rockwood and Stengel for example, it seems to me on the record they are virtually indistinguishable, the entire stock of Rockwood being held by him——

The Court: You mentioned by a transfer of stock between individuals that the dissolution of the combination as to stock ownership of the corporations would be defeated.

Mr. Wright: Entirely defeated. It would be completely nullified unless there were similar prohibitions as to these individuals who were found guilty of violations here as well as their corporations.

The Court: Is there anything further?

Mr. Waller: Now, it seems to me that is just an indirect way of getting some defendants in this case that were not

in here and effecting rights of people that are not before the Court.

The Court: Stengle and Sudekum were before the Court.

Mr. Waller: They were before the Court, yes sir. Now, you take these corporations that were mentioned in the case because they happened to be in franchises that were not [fol. 278] defendants in the case at all.

The Court: Well, according to this new paragraph 19 that has been added, it wouldn't affect any of the other corporations at all.

Mr. Waller: Well now, that is true as to all of them that were not included in the franchises but he is still referring in two or three cases—For example, take this Lawrenceburg business; take Chickasaw, Mid-State, Dickson. Now, Mid-State, Dickson and Chickasaw, the only violation, as they call it, is that Stengle owned half the stock of these corporations. Rockwood doesn't own any stock in those corporations. They are not defendants at all in this case. Those are just little individual partnerships in the corporate form with Stengle individually yet they are not involved in this case.

The Court: Well, evidently I based that finding, I mean that conclusion, upon the finding which showed, as I now recall—I can't keep the facts all in my mind, but as I recall the finding showed that all stock ownership outside of ownership of stock in Crescent, that ownership in all the affiliates was corporate ownership, wasn't it?

Mr. Waller: No sir.

The Court: Except Stengel's ownership of Rockwood.

Mr. Waller: Well, Mr. Stengel owned the stock in Rock- [fol. 279] wood but now Rockwood has no connection at all with Mid-State, Dickson and Chickasaw. Those are three corporations in which Mr. Stengel owns a half interest individually. Rockwood has no connection with them and they are not involved in this case; they are not defendants and they were never brought into the case except when the franchises were introduced in evidence, it appeared in the franchises that some of them were included in the franchises.

Now, your Honor's conclusion No. 21 doesn't say a word about Mr. Stengel divesting himself of any interest in those corporations. That has just been brought into this decree, which is outside the scope of your Honor's ruling.

The Court: Yes sir, I don't think I considered that. I don't see any evidence of it.

Mr. Waller: Now, there are a few other corporations that are non-defendants, which are: Ruffin Amusements, Newport. They are affiliated with Rockwood in that Rockwood owns a half interest in Ruffin Amusements and Cherokee owns a half interest in Newport. We don't think any of those corporations ought to be affected by this decree. Cherokee owns a half interest in Newport. In other words, we think these corporations ought to be included in that paragraph 19 that Mr. Wright suggested.

The Court: What corporations do you think should be included?

[fol. 280] Mr. Waller: Mid-State, Dickson and Chickasaw. They are the ones that are not affiliated with Rockwood at all. And then three others that are not defendants in this case, Laurenceburg, Newport and Ruffin.

The Court: What do you say about that, Mr. Wright?

Mr. Wright: If the Court please, I believe it is correct that in the ownership of Chickasaw, Dickson and Mid-State a half interest is held by Stengel individually rather than by the Rockwood Company. I think the reason that this finding got in here though and the fact that Rockwood held a half interest was because Stengel in his testimony, referred to those companies and these situations as Rockwood towns, Rockwood affiliates. In other words, he made no distinction apparently in his treatment of the companies in which he owned a half interest as an individual and those in which the Rockwood Company, of which he was sole owner, owned a half interest, and it is difficult to see how, for practical purposes, there is any substantial difference in those situations: that is, the relationship of Mr. Stengel in either case and the company's in question is exactly the same.

Now, there was evidence with respect to Chickasaw and there are findings how that half interest was acquired. That was the deal in which half of the Chickasaw Company went [fol. 281] to Ruffin and the other half was bought by Mr. Stengel, and Mr. Stengel negotiated the franchise, including Chickasaw towns with the other Rockwood towns.

The same thing is true with respect to Dickson and Mid-State insofar as the franchise was concerned. Those were treated as Rockwood towns by Mr. Stengel and negotiated by him and included in the Rockwood franchises and I take it that was the reason why they weren't put in the excluded list of affiliated corporations because they were involved in the violations which your Honor found had occurred.

The Court: Which ones were those now, Chickasaw, Mid State and Dickson?

Mr. Wright: Yes sir.

The Court: What about this 15?

"That the defendant, Anthony Sudekum, be, and he hereby is, required to resign as an officer of any corporation, except The Crescent Amusement Company, which is affiliated with any exhibitor defendant, and said defendant is enjoined and restrained from acquiring any control over any such affiliated corporation, except The Crescent Amusement Company, by acting as an officer thereof, or otherwise."

Do you have any objection to that?

Mr. Waller: I don't think, as far as Mr. Sudekum is con- [fol. 282] cerned, there is any sort of objection to it.

The Court: That is what he would in all probability want to do.

Mr. Waller: Except perhaps if Lyric is out of the case. If your Honor does leave Lyric out—we think Lyric ought to be excluded.

The Court: How would that affect this?

Mr. Waller: I don't think it is particularly affected. I mean being an officer doesn't make much difference there: He is permitted to buy for Lyric.

The Court: Now, in that respect do you wish to file a petition for those other stockholders of Lyric in this matter?

Mr. Waller: Your Honor here is what we had in mind a minute ago. I would like to be heard just a few minutes in support of our proposed paragraph 5. It takes the place of the plaintiff's decree about this.

The Court: You have no objection then to paragraph 15?

Mr. Waller: Except I would say this. I don't think the individual defendants ought to be mentioned by name at all in the decree. If they are to be mentioned, I think that is all right. Now, this last clause in there "by acting as an officer thereof, or otherwise", in paragraph 15. As I say, that would be involved in the Lyric situation because——

The Court: All right, now, in place of 17 you propose that [fol. 283] it be changed to require the defendant Stengel to resign any office and require the defendant Stengel to select one of the exhibitor corporations in which he shall hold an office and resign any office he might have in any other company or defendant exhibitor corporation? Is that it?

Mr. Waller: Yes sir, I think that would be preferable.

The Court: Well, that is, as I see it, not objectionable. The fact is I didn't intend to require him to stay with any particular corporation. It was my idea to permit him to stay with whichever one he preferred.

All right, now, what next?

Mr. Waller: 16 and 18, we think they ought to come out entirely.

The Court: All right.

Mr. Waller: Now, the next thing, I want to go for a few minutes, if your Honor is interested in hearing it, to our proposition that this divestiture should be postponed until the injunction is given a trial period. I think that is a very usual provision in a case of this kind, for example, the American Can Company case. That very thing was done there. The Court held that the American Can Company was in violation of the Sherman Act, monopolizing the can business, and the whole question in this opinion was the question of relief and the Government asked for dissolution of the company. There wasn't any question of any owner-[fol. 284] ship of stock in any other corporation in that case. The dissolution of course, of a corporation of that kind would be analogous to divestiture in this case.

Now, the Court decided that it was possible that the dissolution ought to be decreed if it turned out, after trying this injunction out, that the injunction was insufficient, and here is what they said, and we think that that is this case exactly:

"In passing upon the government's contention, little will be added to that which has already been said. Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. * * * It is the duty of the courts to give effect to the legislative will, but it is equally their duty to shape their decrees as to bring about the result desired by Congress with the least possible waste of anybody's time or of anybody's money."

Then the Court discussed the public interest that was involved.

The Court: Of course, I don't know what the particular facts were in that case. There might have been certain circumstances that would have justified that.

Mr. Waller: Each case stands on its own facts. I am [fol. 285] just trying to get the principle before the Court. There the Court said this: "If, as has been suggested, jurisdiction over the case is retained" and, of course, it would be retained for the purpose of contempt proceedings and applications for relief."

The Court: Well, it is retained for those purposes.

" * * * the assurance that the defendant will not resort to unfair practices will be well-nigh absolute. Under such conditions it will not be likely to accept a competitor's offer to sell out to it, and thereby add to that size and power which, acquired as they were, in defiance of the law, the court must necessarily view with suspicion and distrust. Under such circumstances the passing of a decree for dissolution seems both unnecessary and unwise. The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal * * *"

The Court: As Mr. Wright says, "let the punishment fit the crime."

Mr. Waller: "In this case it appears probably that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the [fol. 286] play of economic forces. If so, no dissolution should now be decreed."

So, what the Court did was to enjoin those unfair practices and retain the case in court and tell the Government, "Now, if this doesn't work, you come in and ask for dissolution."

Now, I think, if your Honor please, the economic factors in this situation are something that ought to be considered by the Court. Without any evidence on that question your Honor orders one corporation to divest itself of another one. I want to just show your Honor about this Rockwood and Cherokee situation. Rockwood has these little towns, some in East Tennessee and one up in Guthrie, Kentucky and two or three of them down in West Tennessee. They are scattered all over Tennessee. There is no contention—

I think Nashville is the central place to buy the pictures for those towns. It is the central place to have the headquarters. Cherokee is an affiliate. Your Honor will recall Parrott & Hendren were about to go broke and they formed this partnership, we will call it, with Rockwood. Now, if you divorce Cherokee and Rockwood you have got two very small chains of small town theatres. Now, I think it is well known that local men can operate theatres in their own home towns just like a local man can operate a filling station. He can take one theatre and if he has a fair chance, he can make a go of it but when you take several theatres together and one man tries to operate them he has to have enough of them where the overhead won't be so much per [fol. 287] theatre as to absorb his profits. You can take a very small corporation and it will make a go because of the local atmosphere, etc., or you can take one somewhat larger, but when you get to this intermediate class your economic hardships are such as to make it very difficult to survive.

Now, take the question of bookkeeping. You have got a central bookkeeping system and one man can look after your taxes, look after your leases—there are a lot of things in addition to purchasing films. Now, if you take these little chains, Cherokee and Rockwood, and leave them together with Newport, that only takes half of Mr. Stengel's time approximately to look after this central organization. If you cut these to pieces the problem of getting a central management is very difficult. Now, especially is that true in times like these with war going on. We think that a fair trial of the injunctive relief ought to be granted before that cutting apart of these little corporations is decreed. Now, as I say, that is a principle that has been followed and tried. They give a fair trial to the injunctive relief proposition, leaving the door open for the Government to come in, if the Government thinks that there has been a violation. It is rather difficult to conceive in these little towns of a violation of the Sherman Act by excluding competitors unless one of these theatres gets run down to where [fol. 288] some fellow will want to come in and compete. In other words, it is all little towns where it is recognized they are not big enough but for one theatre and so far as Rockwood is concerned, I think the proof shows it never had any competition but in one place and that was in Rogersville after Rockwood had bought out the Rogersville Theatre from Cumberland. Now, there is certainly no harm

in combining these situations in the purchase of films. Naturally they would get pictures cheaper for this reason. In other words, there is no question there of squeezing out a competitor or even obtaining a competitor although the decree leaves plenty of room for a competitor to come into a town that is big enough for two theatres. There is no question of anything except combining theatre situations in making a film deal so that you can get a little better price on the pictures from the distributors and that don't hurt anybody. The distributors save money, the exhibitor saves money and there is no competitive situation involved there.

Now, we think in cases like that the injunctive relief is certainly sufficient because your injunction provides the minute any competitor does come into one of those towns then that town must be left out of any circuit deal. Just the minute a competitor comes in that town is set apart from all those other towns, and when the competitor doesn't come in there, what harm is there in letting them pool [fol. 289] those theatres for saving overhead, buying pictures or any other purpose? We think that at least ought to be given a fair trial for some fixed period before the dissolution of these little theatres is decreed.

The Court: What do you want to say about that Lyric, Mr. Waller?

Mr. Waller: I just wanted to add to what Mr. Armistead said about that—I think these Crufes, the two children owning the other interest, certainly ought to have some rights in this situation, which have not been represented in this proceeding, and I think they are entitled to some hearing on the matter before——

The Court: Well, are they complaining about it?

Mr. Waller: They are not before the Court. They are not complaining.

The Court: They might be glad to have an opportunity to buy this interest.

Mr. Waller: I think your Honor can't pass on that.

The Court: As I say, I don't know.

Mr. Waller: For the reason, I say, I don't think this case is in shape now for your Honor to rule on any material right——

The Court: I can't go out and ask them to come in and tell me. If you want to file a petition in their behalf I will permit you to do it.

Mr. Waller: Here is this proposal we had, that in the [fol. 290] event the Government files a petition for dissolution all interested parties shall be given an opportunity to be heard whether now parties to this proceeding or not. Now, if your Honor overrules that suggestion and thinks the dissolution ought to be decreed immediately without the different parties——

The Court: You can just forget about the trial period under the injunction. I am not going to consider that at all. I am not going to have that matter before me. I am going to get rid of this lawsuit.

Mr. Waller: I think the proper solution would be to have a reference to determine the economic aspects of this Lyric situation so that your Honor will have some proof to go on and that can be determined or they can come in by petition.

The Court: I don't know. They may be glad of the opportunity to buy this stock.

Mr. Armistead: Then we want to file a petition.

The Court: All right, I will permit you to file it. How many days do you want to file it?

Mr. Armistead: We can dictate it tomorrow and send it down to Alabama and get it back by Saturday or Monday.

Mr. Wright: If the Court please, it seems like the filing of a petition at this time is premature. We have here a holding of the Court that the stock of this corporation [fol. 291] is illegally acquired and held by the Crescent Company. Now, a decree, it seems to me clearly, should be entered on the basis of that finding.

The Court: I am going to enter the decree and permit them to file a petition to try to show that it would work a hardship on them if that decree be carried out in that manner.

Mr. Wright: There is no objection. I thought perhaps you intended to postpone the entry of the decree until it was in.

The Court: No. Is there anything further? I understood you had some objections and proposed amendments to findings on behalf of Rockwood and two or three others, Mr. Waller.

Mr. Waller: They have been filed, your Honor. I understood that your Honor wanted to pass on those without oral argument.

The Court: How is that?

Mr. Waller: I didn't understand that your Honor wanted oral argument on those.

The Court: Gentlemen, I told you I would hear you on everything that you wanted to be heard on, provided, we could get it in one day.

Mr. Waller: I wrote your Honor a letter telling you we weren't going to argue them.

The Court: If you don't care to argue them then I will take them and act on them.

Well, I haven't heard from the amicus curiae yet.

[fol. 292] Mr. J. F. Caskey:

I am glad to sit at the same table with Mr. Wright. I don't prefer to be on his side of this controversy. The five distributors whom I represent, interested in this case and listed in the first twelve paragraphs are interested simply in clarity and preciseness. A great many years ago the Government commenced an anti-trust suit against several of them, which was prolix and ambiguous, and after the case had reached the Supreme Court Mr. Justice Holmes condoned the prolix and ambiguous language and ever since then anti-trust complaints have been prolix and ambiguous but we think that under the new rules there should be as much certainty and clarity as is possible.

Now, as I sat here today listening to the discussion and comment of the Court I think I understand this decree a great deal better than I did and I have studied it prior to this hearing. The searching comments of the Court and the concessions of the Government have made it quite a different document. We are only hopeful that in the final draft that clarity which has been attained by the discussion here today will be embodied in the language.

Our interest comes because we have to continue to deal not only with the various components of these circuits but also with their competitors. We would like to know as [fol. 293] best we can what we can't do. I appreciate it is no duty of either the Government or the Court to draw a chart for us to light our path but what your Honor says this morning about franchises is most illuminating. You stated that the one which had been entered into were invalid per se. Now, we know what that means because those documents are in evidence. And then your Honor abjured us not to make any more like them. Now, I understand

that if your Honor will just put that down on a piece of paper and sign it we will have a chart. There won't be any need for lack of clarity. And, of course, we will be able to compare proposed documents, if any such be contemplated, and I might say that I know of none, with what has been condemned, and, of course, the duty will be for us to determine at our peril whether what is proposed is like what has been condemned or is not.

Again, as to the maintaining of the monopoly, we are appreciative of the fact that the Court recognizes that in most of these situations there is no competition and that, therefore, our dealing with whoever shall be the purchasing agent or the new elements will not be a violation of the decree, because I say to you frankly that I am not interested in the law as to whether or not persons who have actual knowledge but who are not defendants can violate [fol. 294] a decree. We have no purpose to participate with anyone in the evasion of or violation of any decree of this Court whether we be technically bound by it or not, but the clarification that came from the discussion is helpful.

There again clarification came as to section (7). We think now we understand that Mr. Wright simply means that future violations of section 2 of the Act are prohibited. Of course, we would prefer that the language of the statute, which is monopolizing and not counsel's language, unreasonable monopoly, be used but I think now we have had a clarification of it.

So again as to the provision as to the covenants in restraint of trade for competitive situations, while that may not directly affect our dealings it, of course, does affect us if any adjudication by this Court is to be the basis of future litigation, and I think when it is appreciated, as your Honor has so clearly stated, that what is held to be illegal is that which was a part of the plan or scheme of monopolization, that there again we have light and clarity.

I am doubly appreciative of the opportunity to appear here as a friend of the Court and to have had this opportunity to say these few words.

The Court: We are delighted to have you, Mr. Caskey. We are sorry we couldn't keep you in this lawsuit.

[fol. 295] Now, Mr. Wright, if you have anything further to say about paragraph 20 now is the time to be heard.

Mr. Wright: I have only this to say and I can say it in five minutes: That if paragraph 20 is eliminated from your decree then if I were the Crute heirs or these other people who were going to have an opportunity to acquire these businesses as a result of this divestiture I wouldn't want to acquire it. Unless I had some assurance, unless these people have the assurance that this paragraph is intended to give them that Crescent would not move, or these other defendants cannot move into these towns again and put them through exactly the same course of conduct they went through before and caused them to sell out originally, then I would say there is very little purpose in attempting to re-create the competitive condition that prevailed at one time.

The Court: I agree with you in that respect. Is there any method by which that can be obtained without keeping the case in court?

Mr. Wright: The only other method, the only substitute for that is to simply say that the exhibitor defendants are enjoined and restrained from acquiring a financial interest in any additional theatres outside of Nashville. This provision there was put in for their benefit.

[fol. 296] The Court: Could you go a little further, as you have in some of these others, and say for the purpose of creating or maintaining a monopoly for preventing competition?

Mr. Wright: Well, I don't think—our experience has been that that, of course, is a general provision that is in the Act. Now, we have showed it at great length and it has taken two years to do it that way. The general prohibitions contained in the Act were not sufficient to prevent these companies from expanding into these areas and taking over the independents who tried to stand up to them and compete with them. That certainly has been demonstrated by this record and by your Honor's own findings and conclusions.

Now, on that record we are certainly entitled to a decree which goes further than just to say you can't do this again except where you do it in such a way as to violate the Act.

The Court: As not to violate the Act.

Mr. Wright: Yes, sir, but I say we think that without this——

The Court: Here is what I can't get in my mind. It is not a violation of the Sherman Act to have a large number of theatres. The number by itself is not a violation of the

Sherman Act. It is only when the number is used in such a manner as to obtain a monopoly and prevent free com-
[fol. 297] petition in the marketing of films in interstate, considered in connection with other matters, such as we have in this case, if that assumes anything of an unlawful aspect. Now, just the mere fact that some circuit has a large number of theatres is not a violation of the Act. They might have a large number of theatres and never be engaged in any unlawful practices, as contemplated by the Act. Now, here is a company——

Mr. Wright: That did engage in unlawful practices.

The Court: ——that did engage in unlawful practices all right. They have been enjoined from further engaging in any unlawful practices and the combination has been dissolved. All right. Now, I assume as I know to be a fact in this case, I assume that these gentlemen, of course, will do everything possible to avoid any further violation of the Act. As long as they do so, as long as they don't violate the Act, why should not they be allowed to have just as many theatres as they want?

Mr. Wright: If the Court please, it is a question of how many bites at the apple you intend to allow the particular defendants. Now, any individual at all is subject to the restraint of the Sherman Act, and if somebody, who had never gone through a trial, who was not indicted and brought in here and found guilty of—The Sherman Act itself, of course, prohibits them from going out and acquir-
[fol. 298] ing a theatre for the purpose of eliminating competition or for the purpose of establishing an unreasonable monopoly.

Now, as I say, the entire lawsuit has been, it seems to me, a very great waste of time if when we get all through all we have is a decree which tells these people, whom we have gone at great length to prove have built up an illegal monopoly by illegal means, that they are not subject to any more restraint than they were at the beginning of the suit or than anyone else is, who has never come in here.

The Court: No, I wouldn't say that. If they build up another monopoly they would be but if they acquire other theatres without necessarily building up another monopoly——

Mr. Wright: It is not a question of another one. It is adding to this one.

The Court: Or adding to this one.

Mr. Wright: They have already been found to have been acquired by illegal means. Now, I say that in order to make the decree effective against such monopoly the Court should go further than to simply enjoin them against further violations of the Act. There ought to be definite and positive assurance such as a provision like this, that they will not have an opportunity to again expand in this manner and then have such punishment as would occur to wait a two or three year trial. It seems to me we are at the point now [fol. 299] where definite preventive action is required, that is, that they should be in a position where they would have to come in and make an affirmative showing that they were not going to violate the Act in any case where they move into new territory and acquire new theatres. That is just an ordinary simple preventive measure.

The Court: How would that be done? Suppose they file a petition down here and want to buy a theatre in this town. All right, they say they are not going to violate the Act in any way; that it won't add to their monopoly, and I give them permission to do it. Then they come in again later and want to buy another theatre and so on and so on and so on until they have bought fifteen or twenty more theatres, and then they start violating the Act. They could do that just as easily after I had given them permission to buy these theatres as they could have if I just leave it out entirely.

Mr. Wright: We haven't, your Honor—there is a very important substantial difference in this. Before they can get your Honor's approval the party who is here complaining, his competitor who is going to be hurt, would have an opportunity to come in and be heard. He would be given a hearing and your Honor would have the question before you before the damage was done. Of course, it is perfectly true that under the law, after the law, after the acquisition [fol. 300] is made, if the competitor is run out of business we can come in and file a lawsuit as we have done here, and after we make the necessary proof, then we get a decree.

The Court: This though would limit that to acquiring any additional theatres outside of Nashville where there is a theatre in operation.

Mr. Wright: Where there is already a theatre in operation because they might want to acquire a theatre in some town or build a theatre in some town that doesn't have a theatre.

The Court: If they do, I think the people there ought to have the right to have a theatre show and see pictures.

Mr. Wright: I think your Honor is correct in that insofar as it is a question of furnishing facilities to people that haven't had them before. That, of course, should not be discouraged but I don't think this provision does that. That kind of modification would certainly be preferable to the elimination of any restraint.

The Court: Anything further?

Mr. Wright: Just one thing that is occasioned by Mr. Caskey's remark. I don't understand that I have conceded here or made any concessions with respect to what the decree means. Anything that has been said here by me has been an interpretation in my language. I thought I made it very clear that what I attempted to put into the decree [fol. 301] was your Honor's language to comply with your Honor's decision.

The Court: I think Mr. Caskey made an unfortunate choice of words when he intimated that you conceded anything. (Laughter.)

Mr. Wright: As far as Mr. Caskey is concerned and his clients, we have a suit pending against those clients and any relief that we are entitled to against them we intend to see that we get there, so I think the question of how this decree here affects them is purely academic.

The Court: What he means is that he had interpreted the decree differently from the way you interpreted it.

Mr. Wright: It is so understood and I have no objection to him saying that.

Mr. Waller: Can we hand in our draft of the decree tomorrow morning? We had two or three insertions to put in as a result of the discussion.

The Court: Yes, sir, that will be all right. I won't have time to work on it before tomorrow anyway.

Now, Mr. Wright, we had some argument in this matter two or three weeks ago when Mr. Raftery was here relative to the phase of the case concerning United Artists. He has offered a short suggestion here that I will hand to you. I don't know whether you may have it. Was Mr. Wright furnished a copy of this, Gentlemen?

[fol. 302] Mr. Cornelius: Yes sir, if your Honor please. General Frierson did.

Mr. Wright: I have a memorandum of law that was submitted by the United Artists Corporation, if that is what your Honor referred to.

The Court: That was relative to the injunction?

Mr. Cornelius: Yes sir.

The Court: He said you shouldn't issue an injunction against him. Do you want to be heard on that?

Mr. Wright: I want to be heard to the extent your Honor wants to hear me. As I understand his point, it is simply that inasmuch as competitors were eliminated in those situations, therefore, that your Honor ought to forget all about that.

The Court: I am not particularly impressed with his proposition on the injunction but he did bring up a question in regard to the costs, which I think—of course, that is in the discretion of the Court. I don't see that his client should be onerated with all the costs of this cause.

Mr. Wright: Now, as to costs, if your Honor please, our practice is simply to assess costs all against the parties or whatever defendants are liable, and then I assume that any adjustments made as between the defendants may be made and should be properly made at a hearing, at a later hearing in which the Government would not necessarily be in- [fol. 303] terested. That is, the costs, I think, in the first instance should be taxed against all the defendants and then the Court is in position to make any equitable distribution of those costs that is thought to be desirable but I don't think that problem comes up in the first instance or is one that the Government is concerned with because as far as I know all these defendants in the suit are solvent. I don't think we have any particular interest in the attempt to collect all or any of the costs from anyone particular defendant and that whatever division your Honor wishes to make as to costs among the several defendants would be a matter in which we would have no interest. We would be entirely agreeable to any such division as you work out on a hearing between them.

The Court: Now, he says that—have you seen this memorandum of proposed changes in the findings and conclusions?

Mr. Wright: Yes sir, I have a copy of it.

The Court: Do you want to be heard on that?

Mr. Wright: Proposed amended findings of fact——

Mr. Cornelius: No. Mr. Wright, that was withdrawn.

The Court: He withdrew the one that was set for the date in question, April 14th, and they had another one which just contained two changes.

Mr. Cornelius: We furnished General Frierson with two copies of it.

[fol. 304] The Court: Mr. Clerk, will you have assembled all of the objections and amendments to the findings filed by the defendants and put them in one envelope so I can have them sometime next week?

The Clerk: All right, Sir.

The Court: Who all filed them, Muscle Shoals, Rockwood and some other defendants, didn't they?

The Clerk: I am not able to say.

Mr. Waller: Cumberland and Rockwood.

The Court: Is that all?

Mr. Waller: Crescent's haven't been completed.

The Court: Do you wish to file any?

Mr. Waller: The truth of the business is, we just didn't have time to get to it. We thought we would do it within ten days after the decree.

The Court: You will have ten days after the entry of the decree.

Mr. Waller: Unless your Honor would rather have it before.

The Court: No, I want to get this decree entered and we will get that out of the way. Then I won't pass on any of these findings until ten days after this decree is entered. Then you file your petition within that time for these heirs who are in this Lyric Theatre.

Mr. Wright: If the Court please, I would like to say a few [fol. 305] words about this last memorandum and the change that he proposes in finding 112. The significance of that escapes me.

"112. For the most part theatres operated by independents in competition with the defendant exhibitors and their affiliates" and he proposes to insert in here after the words "for the most part", "except as specifically found herein with respect to Henry's Theatre in Union City and the independent theatre in East Gadsden, Alabama."

The Court: What I meant by that was, for the most part theatres operated by them have been greatly inferior to

those operated by the defendant. The proof shows that Henry's theatre down at Union City and this theatre that he refers to at Gadsden were not inferior.

Mr. Wright: Well, it shows that even without this insertion. There is no conflict between your Honor's finding and that fact, in any event. I don't see what the insertion accomplishes. The finding is accurate as it exists. I have not checked the record enough to know off-hand whether those are the only two in which there were supposed to be a finding that the independents were superior but in any event I find it there as to comparisons, and I don't see any occasion to try to summarize the different situations you cited in this finding 112. I just don't see what he is trying to accomplish here by this.

The Court: Well, he had one thing in mind and Mr. [fol. 306] Waller had the same thing in mind and they got in a huddle here about that on the floor and both of them agreed on that proposed change, as I recall.

Mr. Waller: Here is what it was. There was no express finding that the Rogersville Theatre, Mr. Miller's, was inferior to the Cumberland Theatre and there were not express findings in several of those situations but there were express findings in those two, and as I understood that, what Mr. Raftery was asking for was an express finding in the situation ~~and your~~ Honor stated that rather than to make an express finding on these others you would just exclude those two.

The Court: I don't see that that is a whole lot different.

Mr. Wright: I fail to see the materiality of it myself. The change in the conclusion there in No. 13 is simply a change in your Honor's decision.

The Court: I don't think he wanted—Well, that was based upon the theory, as I understood it, that he would agree with him on his principle of law that the injunction should not issue against him, if I recall correctly. Is that right?

Mr. Cornelius: No, I think on that—to refresh your Honor's recollection, and I think that we are rather at a disadvantage because April 19th was set for a hearing on this matter and I thought General Frierson made a very complete reply on the part of the Government. Now, when [fol. 307] our big gun is withdrawn here we have been forced to depend upon a pop-gun, but I think I can refresh

your Honor's recollection a little bit on what Mr. Raftery had in mind.

The Court: That was on the combination, wasn't it?

Mr. Cornelius: Now, if your Honor will notice 13, paragraph 13—

The Court: In the conclusions?

Mr. Cornelius: Yes sir, on page 148 of this printed copy. It is paragraph 13 of the conclusions.

The Court: Is that where you were in some undesirable company?

Mr. Cornelius: Yes sir. Here was his argument: that he did not combine with each of these major distributors and you put him in a class, when he was found guilty, when Mr. Raftery's client was found guilty, in an isolate case. Now, then, he pointed out this, that section 17 specifically finds wherein United Artists violated the law and, therefore, they should not be mentioned in this general provision.

Mr. Wright: I think the answer to that, your Honor, is in the fact that paragraph 13 does not purport to be a conclusion of law on the part of United Artists. No. 13 refers to the manner in which the defendant exhibitors have violated the Sherman Act and that was why—there is no duplication in any sense between 13 and 17.

The Court: It don't say the distributors have violated it at all, it says—well, it would infer that. It says the dis- [fol. 308] tributors or the exhibitors have violated the Sherman Act by combining with each other and with the major distributors, Paramount, Fox, Warner, Loew's, RKO and United Artists.

Mr. Cornelius: Now, United Artists only combined with Cumberland, Rockwood, Rosenbaum and Sudekum. You have got that in 17. Now, you put them up here in 13 and it is much broader than that, I am sure you intended to find from the evidence. I don't see [illegible]y the Government objects to it. You have got there wherein United Artists violated the Sherman Act by combining with these specific defendants. Now then, 13 is certainly a mis-statement. We didn't combine with all the exhibitor defendants, and that is the clear inference from 13.

Mr. Wright: I respectfully submit, your Honor, that it doesn't seem to me that United Artists has any complaint about 13 because that is the whole conclusion as to what the defendant exhibitors did and it is not made the basis for

the entry of any injunctive provision against United Artists at all.

The Court: I understood him to say that, if I recall, that if the Court would re-write that and make it read that the defendant exhibitors have violated the Sherman Act by combining with each other and with the United Artists and the major distributors, Fox, Paramount, Warners and Loew's, it would be satisfactory.

Mr. Wright: This paragraph 4 of the decree and paragraph 13 only enjoin the defendant exhibitors. It does not [fol. 309] enjoin United Artists or any distributor from doing anything. That is why, it seems to me, that any objection from United Artists as to either that conclusion or the paragraph that it is based on is wholly academic. As to United Artists, I feel that they escaped very lightly in the conclusions and in the decree. There is a finding on the Gadsden situation, which, it seems to us, clearly called for a conclusion of violation.

The Court: That happened after the lawsuit was filed.

Mr. Wright: That is quite true but nevertheless that was within the issues.

The Court: No, I don't think I can grant any relief that happened after the filing of the suit unless it was brought in by a proper amendment.

Mr. Wright: I think, if your Honor please, we went all through that before we introduced the Gadsden proof and there was, as I recall, an amendment filed which charged United Artists with continuing violations that followed along the Gadsden situation after the filing of the suit, and there is a finding of fact to the effect that United Artists and all the other distributors had most unreasonable clearance on the Dixie there.

The Court: Where is the Gadsden situation found in this finding?

Mr. Wright: The finding that I was referring to is No. 100, the last two paragraphs or next to the last paragraph of 100. It is at page 87 of the printed copy. I don't know [fol. 310] what it says in the other one.

The Court: Well, I say there: "Other than the situation resulting from the execution of the franchises in question, the Court views evidence relative to the Gadsden area as significant only in comparison of the preference accorded the Ritz Theatre in Alabama City."

Mr. Wright: I take it that that preference was, in effect, an illegal discrimination which had resulted from the application of pressure by Crescent upon these distributors somewhere similar to the Interstate Circuit situation but I don't wish to argue the point here because we assume that your Honor had given the matter consideration and had decided——

The Court: I considered that part of it and I considered the fact that all that had transpired since the lawsuit was filed. Apparently I overlooked the amendment in that respect. I didn't recall any amendment being filed and I didn't see it in the file. I don't know that I searched for it particularly. I just couldn't keep all those things in mind.

Mr. Wright: Yes sir. (Looking for amendment) Well, I can't put my finger on it right now.

The Court: I know I had in my mind that that was something that happened after the lawsuit was filed.

Mr. Wright: That is right, it did. There is no question about that.

[fol. 311] The Court: For that reason I didn't pay any particular attention to it.

Mr. Wright: I don't think it is of great importance except to show that the, as they say, relief that was granted against United Artists was less than co-extensive with the violations that they had been involved in, and as far as they are concerned, it seems to me that United Artists have no ground for complaint whatsoever as to the limited extent to which they have been put in this decree.

The Court: I don't think they are complaining very much. Suppose you let me have that finding back so that I can keep the record, the one I handed you——

Mr. Cornelius: Do I understand your Honor to say that you were not very much impressed with Mr. Raftery's argument that no injunction should be issued because those two situations had occurred and had been passed?

The Court: I suppose you did, Mr. Cornelius.

Mr. Cornelius: Well, I was just amazed because I was very much impressed when I heard his argument

The Court: I was more then than I am now myself.

Well, Gentlemen, if you send these matters to me, please mail them to me at Columbia because I will be in Columbia all next week and I will take this with me and I will try to write the decree next week.

[fol. 312] Mr. Wright: Couldn't we write it now?

The Court: They say they have got some particular matters that they want to incorporate in this decree. I thought I had them all here. I got part of it from this other order and I understand that there was something else that they wanted to put in.

Mr. Waller: We can have ours to you tomorrow, your Honor.

Mr. Wright: Insofar as these motions to amend and findings are concerned, of course, the entry of the decree doesn't necessarily have any effect on those. That is, as I understand it, retains jurisdiction under 52-(b) to make any changes in the decree which may be occasioned by such changes as you may want to make in your findings or decision. I understood that here we had covered completely the question of whether or not the decree that was presented did conform to the decision that was made, and if it did, I assumed that it was going to be entered or was going to be made to conform at this hearing.

The Court: I am ready to act on it if counsel want me to act on it. They asked for an opportunity to present those changes in one or two paragraphs. I don't want to cut them off from that opportunity.

Mr. Wright: Excuse me, may I ask, were those changes offered based on changes in the decision or changes which you regard as necessary to make the decree conform to the [fol. 313] decision that rendered?

Mr. Waller: Based on the discussion this morning. We simply want to adopt—not any change except to conform with the discussion today and the Court's rulings on the interpretation.

The Court: Just what is it that you wish further to present? I have your request here as to paragraph No. 17, which I am inclined to grant, relative to Mr. Stengel, or which I will grant, as far as that is concerned, in that he shall hold office in the corporation that he chooses to. Now, I have your proposed decree which embodies that and which I can dictate from your language. There was something else, I don't recall just what it was, one particular paragraph.

Mr. Armistead: It was a paragraph that I suggested be added right after paragraph 12, which we wrote out in longhand and which we stated we would have transcribed.

Mr. Wright: That was the paragraph, if your Honor re-

calls, which undertook to limit the scope of the injunction so that it would only apply to precisely similar violations to those which have occurred in the past. I didn't understand that your Honor was given such limitation as that consideration.

Mr. Waller: Shall I read that to your Honor?

The Court: I will prefer for you to hand in what you want and I will get in my office by myself and have it there [fol. 314] and write my own decree. I have got a pretty good idea of what I have in mind, but it is five o'clock now and I am getting a headache and I don't feel like doing a whole lot more on it.

Mr. Wright: Your Honor, there is no particular occasion for me to stay around then, I take it. I would stay over if there was any further use.

The Court: I don't think it would be necessary. I have heard your position about these matters, and I agree with you in most all matters except one or two relative to paragraphs 16 and 18. I think I will take those out, and paragraph 20 I am going to change and make it read that they are enjoined and restrained from acquiring any financial interest in any additional theatres outside of Nashville, Tennessee where there is already a theatre operation, in a town where there is already a theatre operation.

Mr. Waller: That is without the affirmative showing. Is that what is meant?

The Court: That is leaving off of there affirmative showing before the Court that any such acquisition would not unreasonably restrain competition.

Mr. Waller: What I mean, the jurisdiction of the Court would permit us to come in any time, one of these defendant exhibitors come into court and get permission to accept an offer from a small theatre to sell out, if it would not unreasonably restrain competition?

[fol. 315] The Court: I don't know as it would. Why would it be necessary to get permission of the Court?

Mr. Waller: What I meant was, suppose some fellow in a town has got a theatre and he wants to get out of business, sell out, and he wants to sell to the highest bidder and he offers it to us with no predatory practice involved, would that decree prohibit us from buying that theatre?

The Court: The decree, as it is drawn now, would permit you, yes sir. Probably that language should be limited,

limited to the extent that no theatre may be acquired in any town for the purpose of entering into competition.

Mr. Wright: Well, I think, your Honor, as you originally stated, that that serves a very useful purpose in removing any temptation to use predatory practice to acquire a theatre in a town where there already is one. It seems to me that the prohibition serves a very salutary purpose.

The Court: That wouldn't necessarily mean that they couldn't acquire that theatre, would it?

Mr. Wright: I think that would be desirable though to give the independent operator who was there some assurance that he was not going to be subject to pressure from Sudekum——

The Court: He wouldn't be subject to any pressure if he had a theatre there and he knew Sudekum couldn't come in and build one in opposition to him. There wouldn't be any [fol. 316] reason why he would want to sell out.

Mr. Wright: Except, of course, he has other men exerting pressure such as clearance through surrounding towns. I would regard it as certainly weakening of the provision that your Honor suggested.

The Court: Well, it might not but on the other hand, it may be in restraint of trade itself, the decree of the Court might be. Suppose a man had a theatre that he wanted to sell and he couldn't find a buyer for it in this town but Mr. Sudekum would be willing to buy it and would pay him value for it, pay him more than any buyer on the limited market in that town would pay him, why couldn't he sell it to Mr. Sudekum?

Mr. Wright: Well, if the Court please, that gets down to the heart of this matter. I suppose there is not any question but that Mr. Sudekum can afford to pay more for any theatre in any of these towns, because he would make more money out of it by combining with the buying power he has got in his affiliated circuit. The minute you open the door on situations of that kind then the decree does not perform its function in preserving such independent competition as may exist or may arise in this area without any coercion at all.

Mr. Armistead: May it please the Court, if we follow the argument of counsel and a decree is entered in this case as he contends should be entered your Honor will be violating the Sherman Act. That is exactly right.

[fol. 317] The Court: I am cutting off a man's market.

Mr. Armistead: Yes, sir, you are cutting his market off, you are cutting off competition, people that want to buy and compete with each other, and he can't do it.

Mr. Wright: There is no question about that, your Honor, but that is implicit in any attempt that is made to prevent the expansion of a monopolistic combination such as you have got here. There is no question but that the monopoly can make more out of a theatre than an independent and can pay the best price for it. If you go on the assumption that that fact justifies the acquisition of all independents by the monopoly then, of course, the whole procedure does not serve any useful purpose and the thing to do is simply get the independents into the Sudekum fold at sometime and keep them there. I take it the theory upon which the relief has been granted here is that it is desirable to prevent that from happening and to keep and preserve such independent competition as now exists or may spring up in the future and it can't be preserved if arguments of that kind are recognized, that, well, Mr. Sudekum can make more money out of a theatre than anybody else so he ought to have it.

The Court: I am not looking at it from Mr. Sudekum's aspect. I am looking at it from the aspect of the owner of a theatre in a small town that wants to sell and he can't find anybody in his town that wants to purchase it, nobody that [fol. 318] will purchase it. In a situation of that kind where there is only one theatre there why shouldn't he be allowed to sell it to Mr. Sudekum?

Mr. Wright: He certainly wouldn't have a market for it or there wouldn't be any other buyers unless the buyers had some assurance that they were going to be allowed to compete there on even terms with Mr. Sudekum. Unless he has that assurance I don't suppose you can make any such market. Now, any time you try to accomplish—wherever you put any restrictions on the monopoly you, of course, limit the independent's right to sell out to the monopoly but that limitation is done in the interest of the public. That decree that is to be entered here is being entered to vindicate the policy of the Act and the policy of the Act is to keep the independent in business whether he thinks he can make more money by selling out to the monopoly or not. The purpose of the decree is not to enable him to make a profitable sale to the monopoly but it is to serve the public interest by keeping the independent in business.

The Court: All right, Gentlemen, I probably won't get to work on this matter before the first of next week, so when will you be ready with the matters, now, with your proposals?

Mr. Armistead: I expect to have it tomorrow. I am starting it right now.

[fols. 319-325] The Court: If you will send it down to me tomorrow it may be that I can get this matter behind me on Saturday, because I won't get interrupted by myself.

Is there anything further at this time?

Adjourn Court until 9:30 Monday morning at Columbia.

[fol. 326] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION OF DEFENDANTS, ROCKWOOD AMUSEMENT COMPANY, CHEROKEE AMUSEMENTS, INC., AND KENTUCKY AMUSEMENT COMPANY, INC., FOR MODIFICATIONS IN FINDINGS AND CONCLUSIONS OF THE COURT FILED MARCH 3, 1943—Filed March 23, 1943

Come the defendants, Rockwood Amusement Company (hereinafter referred to as Rockwood), Cherokee Amusements, Inc. (hereinafter referred to as Cherokee), and Kentucky Amusement Company, Inc. (hereinafter referred to as Kentucky), and respectfully petition the Court to modify the findings and conclusions filed on March 3, 1943 in the respects hereinafter stated (the paragraph numbers being taken from the aforesaid findings and conclusions of the Court):

Findings

18. Change: "The equipment for the Tracy City theatre was given to Stengel by Sudekum" to: "A small part of the equipment for the Tracy City theatre was given to Stengel by Sudekum."

19. Eliminate Chickasaw Amusement Company, Dickson Theatres, Inc. and Mid-State Theatres, Inc., because there is no evidence that Rockwood owned any interest in them, and supplement by adding the following paragraph:

[fol. 327] "At no time has Rockwood had theatre competition in any town except in Rogersville, Tennessee and Cen-

tral City, Kentucky. In 1938, when Rockwood acquired the Rogersville theatre from Cumberland Amusement Company, W. P. Miller was operating a theatre in a converted warehouse and the said Miller sold his equipment to Rockwood later that year, becoming manager of the Rogersville theatre. Miller's theatre had no sewerage connection and its heating system had been improvised by Miller who had rigged up a 20 H. P. threshing machine boiler in an outhouse and Miller had been competing in this theatre with a new up-to-date theatre which had been constructed by Cumberland in 1936. In 1937 Rockwood acquired the Selba theatre in Central City, Kentucky, at which time F. M. Pittman was operating a competing theatre known as the Empress, and about a month later Pittman sold the Empress to Rockwood. In neither of these instances is there any contention or was there any evidence that any distributor discriminated in favor of Rockwood and against the competition in making film deals."

20. Supplement by adding the following paragraph:

"In 1940 Rockwood itself was operating theatres in thirteen towns having an aggregate population, according to the 1940 Census, of 41,193."

21. Supplement by adding the following paragraphs:

"At no time has Cherokee had theatre competition in any town except about three days in Spruce Pine, North Carolina. Cherokee purchased the equipment in the competing theatre at the request of the owner, J. A. Taylor, who testified that he was afraid that film rentals would go up with two theatres in the town. The only instance where plaintiff now contends that there was discrimination by any distributor in favor of Cherokee is that Paramount included Spruce Pine in a franchise agreement with Rockwood and [fol. 328] affiliates covering 1937-1938 and subsequent product. The facts on this point as found by the Court will be subsequently stated.

"In 1940 Cherokee was operating theatres in eleven towns having an aggregate population, according to the 1940 Census, of 22,847."

25. In the second paragraph eliminate the sentence "As a part of the deal, Parrott & Hendren agreed that Chero-

kee would pay Sudekum a salary of $200.00 a week for his advice and assistance in running the business." This language is adopted from the Government's brief and is contrary to the evidence, which was that the arrangement with Mr. Sudekum was made at a considerably later date and was not in any sense a part of the deal with Parrott & Hendren.

26. In the first sentence eliminate the phrase "a subsidiary of Rockwood" and in the third sentence eliminate "and shortly thereafter, Ruffin was sold a half interest in Chickasaw." This language is adopted from the Government's brief and is not supported by anything in the record. The facts are that Stengel, individually, owns 50% of the stock in Chickasaw and that Ruffin owns the other 50%, having purchased it from one Frank Shepherd.

32. Eliminate the words "negotiated by Sudekum" in the paragraph captioned "*Columbia*", because there is no evidence that the May 3, 1939 deal with Columbia for ten Rockwood and Cherokee towns was negotiated by Mr. Sudekum. The language to this effect is adopted from the Government's brief and is based entirely on incompetent and hearsay evidence, viz., certain tabulations (Exhibits [fol. 329] 3, 4 and 5) filed by Columbia Pictures Corporation in response to discovery interrogatories propounded by plaintiff, in which Sudekum was erroneously listed as the person who negotiated this deal.

Eliminate the first three sentences in the paragraph captioned "*Loews*". These sentences are adopted from the Government's brief and merely summarize a letter written by one Loews representative to another in 1937; and such a letter is not competent evidence as to the truth of any statement of fact therein contained. There is no other evidence that Mr. Sudekum closed this deal for the so-called "Sudekum Junior Circuit".

In the paragraph captioned "*Paramount*", eliminate the phrase "and that Sudekum did not confine himself to the Crescent situations is shown by his insistence that Huntingdon, a Rockwood town, be granted clearance over McKenzie (Ex. 151)." This language is adopted from the Government's brief, which cites Exhibit 151, a letter from one Paramount representative to another which is not competent evidence of any fact stated therein. There is no other evidence that Sudekum insisted that Huntingdon be granted clearance over McKenzie.

35. Eliminate the phrase "In addition to the joint negotiation and execution of licensing agreements" in the first paragraph, because there is no evidence of such joint negotiation. Eliminate the phrase "as a virtual branch of the Crescent business" in the second paragraph, because there is no evidence that Crescent has any interest whatever in Rockwood.

36. Eliminate the last sentence in the second paragraph in which reference is made to "the obvious fact that Stengel and his Rockwood Company were nominal owners of Sudekum's interest in the Rockwood theatres, or so-called Sudekum Junior Circuit". This language is adopted from the Government's brief and there is no evidence whatever in [fol. 330] the record in support of said statement.

37. Eliminate in the second paragraph the sentence "Moore then spent $8,000.00 in improving his theatre." And in the third paragraph eliminate the phrase "subject to acceptance by Mr. Sudekum". The language in question is adopted from the Government's brief and there is no evidence in support of same.

Supplement the second paragraph by adding: "Stengel had been approached by Mr. Dunlap, the Worshipful Master of the Masonic Lodge at McKenzie, who had attempted to interest Rockwood in the McKenzie theatre after Rockwood had acquired a theatre in Huntingdon, a neighboring town, on the ground that Moore was delinquent in his rent and that the people of McKenzie were desirous of having better theatre facilities which could be afforded only by making extensive improvements of the building pursuant to a long-term lease. Moore had told Stengel that he would make extensive improvements and convert his theatre into an up-to-date theatre if Stengel would abandon his negotiations with Mr. Dunlap, and it was then that Stengel agreed to do so. Moore did arrange for a long-term lease with the Masonic Lodge and paid in advance rentals aggregating $3,500.00 and also spent about $2,000.00 in moving some pillars in the theatre building which had been obstructing the vision of the audience and some celotex on the wall. He also spent about $3,000.00 for new booth equipment, but failed to convert the theatre into an up-to-date theatre or to make any changes of substance, with the exception of the removal of these pillars and the purchase of the new booth equipment."

59. Eliminate the next to the last paragraph, which is adopted from the Government's brief and summarizes the flat rentals but ignores the percentage pictures and hence is misleading. Eliminate the last paragraph, which is adopted from the Government's brief and is a mere argument to the effect that Paramount lost money by switching [fol. 331] the runs as between Huntingdon and McKenzie. Reference is made to a letter from one Paramount representative to another which was not competent evidence of any fact stated therein. Supplement by adding, in lieu of said two paragraphs, the following:

"No issue of discrimination by Paramount against Moore was raised in the pleadings or bills of particular filed by plaintiff and cannot be considered as a basis for relief. On the facts, however, there is no evidence that Rockwood would have included Huntingdon in the franchise at the film rentals actually agreed upon, which were stepped up each year, except for the understanding that Huntingdon would have clearance over McKenzie for the succeeding term of the franchise. Paramount may have reasonably expected to receive larger aggregate film rentals from Huntingdon and McKenzie by giving Huntingdon clearance over McKenzie than *vice versa*, for the reason that Huntingdon was the county seat and the theatre at Huntingdon was larger and superior in every respect to the theatre at McKenzie. This was purely a question of business judgment on the part of Paramount, and Moore in his testimony conceded that clearance of either town over the other was simply a matter of trading and paying for the privilege, and that either town which could get it was entitled to clearance over the other." (Moore, R. p. 748).

60. Supplement the first paragraph by adding the following sentence: "There is no evidence that Gorman had any authority from Cherokee, at this or any other time, to make any such representations or to negotiate for the purchase of this theatre."

Supplement the third paragraph by adding immediately preceding the last sentence thereof the following: "The bulk of this $4,000.00 went into a heating system and into a new front for the building, which were permanent improvements, so that Taylor got his money back and also kept the [fol. 332] improvements. Taylor was Ford dealer and in

the real estate business and had operated this theatre only because his lessee had given it up."

61. In the second paragraph eliminate in the second sentence the phrase "to take its product away from Taylor commencing with the 1938-1939 season and". This language is adopted from the Government's brief and is not supported by anything in the record. Supplement by adding at the end of said second paragraph the following:

"The record is silent as to whether Taylor's lessee, Mr. Gutscholk, had complied with his 1937-1938 contract with Paramount or whether Taylor himself, after he took the theatre back, assumed Gutscholk's contract with Paramount; and the record is also silent as to whether Taylor ever had any idea of negotiating for 1938-1939 product. Taylor testified as a witness for plaintiff that he sold out because he was afraid the film companies would raise the price of pictures with two theatres in the town." (Taylor, R. pp. 209-210)

102. In the second sentence eliminate "pursuant to Steuged's instructions". This language is adopted from the Government's brief and is in direct contradiction of Pittman's testimony on direct examination as a witness for plaintiff. Change "impression that Crescent was planning to come into the town" to "impression that some corporation with which Pittman was connected was planning to come into the town"; and add immediately following this sentence the following additional sentence: "Pittman's home was in Greenville and if Rockwood had a theatre in Greenville, Pittman expected to be the manager and Pittman initiated the plan that Rockwood acquire Head's theatre". (Pittman, R. pp. 684-685)

[fol. 333] 103. In the last sentence change "because he realized that he could not compete with Sudekum" to "because he feared that the Empress Theatre could not successfully compete with the Selba Theatre if the latter were under a competent management". (Pittman, R. pp. 678-679)

113. Supplement by adding the following additional paragraph:

"Within three or four years preceding the trial, Rockwood and Cherokee experimentally introduced popcorn sales

and screen advertising in their theatres. During 1939 popcorn machines were put in every theatre, although popcorn sales were made in only seven out of twelve Rockwood towns during the entire year of 1939. Nevertheless, in 1939, popcorn sales and screen advertising accounted for 34.4% of Rockwood's net profit (exclusive of dividends) and in several Rockwood and Cherokee towns there would have been a substantial loss, instead of profit, had it not been for popcorn sales and screen advertising. (Defendants' General Exhibit 216, Stengel, R. pp. 5255-5256 and 5281-5282.) In these small towns, the Saturday business accounted for approximately 40% of all receipts and on Saturday it was almost the invariable custom to show a Western picture which was not produced by any of the distributors alleged in this case to be conspirators (Defendants' General Exhibit 215, Stengel, R. pp. 5267-5273). It would thus be impossible to attribute any definite or even any approximate proportion of the profits of defendant exhibitors to advantageous film deals made with the distributors who are alleged to have conspired with them. Entering into the causes for the profits of defendant exhibitors are many elements of business acumen and good management which are wholly aside from any advantages accruing from film deals. Defendant exhibitors have provided good theatres and good entertainment and have devoted much time and effort in the exploitation of pictures and in giving [fol. 334] the public good entertainment in good and comfortable theatres."

118. Eliminate the entire last paragraph or, in any event, eliminate "Spruce Pine" and "Newport". This paragraph is adopted from the Government's brief and is argumentative and misleading. There is no evidence whatever that the Paramount franchise had any effect on independent competition at Spring Pine or Newport (which are the only two towns mentioned in which Rockwood, Cherokee or Kentucky or any affiliate operates a theatre), and no such issue is properly made in the pleadings and bills of particulars. The theatre at Newport is owned by a corporation which is not a defendant in this case and in which Cherokee owns only a half interest.

119. Eliminate the entire first paragraph or, in any event, eliminate the reference to Smith. This paragraph is adopted from the Government's brief and is argumentative and mis-

leading. There is no evidence that the repeat run clause in the Paramount franchise prevented Tim Smith from buying second run Paramount features in Newport, and (as above pointed out) the theatre at Newport is owned by a corporation which is not a defendant in this case.

In the second paragraph eliminate all but the first sentence. The paragraph is quoted from the Government's brief and the last two sentences are argumentative and misleading. Rockwood operated theatres in small towns, not large enough for two theatres, and the repeat-run clause had two perfectly legal and valid purposes: (1) to enable the exhibitor to eliminate a poor picture and repeat an especially good picture in place of it, which was to the advantage of the theatre-going public; and, (2) to fix in advance the film [fol. 335] rental on such a picture so that the exhibitor would not be required to negotiate with the distributor on terms after the picture had proved to be a box-office attraction.

Conclusions

9. Eliminate Rockwood Amusements, Inc. and Cherokee Amusement Company, Inc., for the reason that there is no finding or evidence justifying a conclusion that said defendants have created or maintained an unreasonable monopoly of the business of operating theatres or that they have combined closed towns with competitive situations in licensing films. The undisputed evidence is that these corporations operate theatres only in very small towns and since all of them are so-called "closed towns", they could not possibly combine closed towns with competitive situations in licensing films. The evidence also is that these two corporations together operate theatres in only 24 towns having an aggregate population of ~~only 54,000~~, according to the 1940 Census.

10. Eliminate Rockwood, Cherokee and Kentucky from this paragraph for the reason that there is no finding or evidence that any independent theatre has been prevented from competing with any of them by reason of any franchise agreement with Paramount, Fox or Warner Bros. The only competition any of said three corporations has had was (a) a few months in the early part of 1938 in Rogersville, Tennessee when Miller competed with Rockwood; (b) about a month in the latter part of 1937 in Central City, Kentucky when Pittman competed with Rockwood;

and (c) a few days in December, 1937 in Spruce Pine, North Carolina when Taylor competed with Cherokee. As to Miller in Rogersville, he had both Fox and Paramount product [fol. 336] when he sold out, and Rogersville was never included in a Warner Bros. franchise until after he had sold out. In the other two situations there was no contention made in the complaint or bills of particular and no evidence that either the defendant exhibitors or the independent competitor had done any negotiating for any product during the short period of competition; and there was no contention or evidence that any franchise had prevented the independent from obtaining product.

11. Eliminate Rockwood and Cherokee, because there is no finding or evidence justifying the conclusion that either of these defendants have combined with each other or with anyone else for the purpose of dividing the territory in which theatres may be operated by any of them pursuant to implied agreements among themselves.

12. Eliminate Rockwood and Cherokee for the reason that there is no finding or evidence justifying the conclusion that said defendants have combined with each other or with anyone else for the purpose or with the effect of eliminating, suppressing or preventing independent competition.

13. Eliminate Rockwood and Cherokee for the reason that there is no finding or evidence justifying the conclusion that they have combined with each other or with Paramount, Fox, Warner, Loews, RKO or United Artists, in licensing films for the purpose or with the effect of maintaining theatre monopolies or preventing independent theatres from competing with them.

17. Eliminate Rockwood for the reason that there is no finding or evidence justifying the conclusion that Rockwood combined with United Artists Corporation to eliminate independent theatre competition in Rogersville, Tennessee, or at Athens, Alabama.

[fol. 337] 19. Eliminate Rockwood and Cherokee (and also Kentucky if Kentucky was intended to be included), for the reason that there is no finding or evidence justifying the conclusion that said defendants have conspired in restraint of trade and commerce with anyone.

20. Eliminate Rockwood and Cherokee (and Kentucky if intended to be included), because there is no finding or evidence justifying the conclusion that said defendants have been guilty of any violation of the Sherman Act warranting the injunctive relief and other relief outlined.

21. Eliminate Rockwood and Cherokee (and Kentucky if intended to be included), because there is no finding or evidence justifying the conclusion that said defendants have been guilty of any violation of the Sherman Act warranting the injunctive relief and other relief outlined. The Court's attention is specifically directed to the fact that this is an equitable and not a criminal proceeding, and any relief granted should be equitable in nature and not penal. That is to say, any relief granted should be for the purpose of preventing a repetition of any unlawful acts and not for the purpose of punishing the parties for unlawful acts found to have been previously committed. To require Rockwood and Cherokee to dispose of the stocks of other corporations owned by them would serve no purpose or benefit to the public, but would amount to confiscation of the property of said defendants and would unjustly deprive the other stockholders in these corporations of the legal and proper benefits of affiliation with Rockwood for which they contracted when these corporations were formed.

[fol. 338] Wherefore, Rockwood, Cherokee and Kentucky respectfully submit that they are entitled to have this suit dismissed against them and each of them in toto; but, if not entitled to such relief that in any event they be eliminated from the provisions to any decree under conclusion No. 21 requiring each corporate exhibitor defendant to divest itself of the ownership of any stock or interest in any corporate defendant or affiliated corporation.

Respectfully submitted, George H. Armistead, Jr., Dick L. Lansden, William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden, Address, American Trust Building, Nashville, Tennessee.

[fol. 339] IN THE DISTRICT COURT OF THE UNITED STATES

PETITION OF CUMBERLAND AMUSEMENT COMPANY FOR RECONSIDERATION AND MODIFICATION OF FINDINGS AND CONCLUSIONS—Filed March 23, 1943

Comes defendant, Cumberland Amusement Company, and respectfully petitions the Court for a reconsideration of the findings and conclusions filed March 3, 1943, to the extent that they affect this defendant and particularly for relief against the conclusions numbered 11, 17, 20 and 21, to the extent that they are intended to affect this defendant, and in support of this petition defendant, hereinafter referred to as Cumberland, submits the following:

1. Cumberland is referred to only in paragraphs 16, 24, and 51-57, inclusive, of the findings of the Court. Paragraph 16 simply gives the date of organization, the name of the President, Mr. Sudekum, and the towns and their populations in which Cumberland owns and operates theatres. Paragraph 24 refers to the organization of Cumberland in about the same language which is used in the same paragraph in referring to the organization of Strand Enterprises, Inc., which was acquitted by the Court of any wrong-doing. Paragraphs 51-57 refer to Cumberland's construction of a theatre in Rogersville, Tennessee and competition with W. P. Miller in that town, but Cumber- [fol. 340] land sold this theatre more than eighteen months before this suit was filed.

2. Although the Rogersville theatre was sold more than eighteen months before this suit was filed, so that the findings relating to competition in Rogersville could not properly be the basis of the relief granted against Cumberland, it is nevertheless submitted that said findings are in certain respects erroneous and should be modified and supplemented in order that the true picture may be presented:

(a) The undisputed evidence was that Miller had a totally inadequate theatre (it was a converted warehouse without sewerage connection and its heating system was improvised by Miller, who had rigged up a 20 H. P. threshing machine boiler in an outhouse), and Cumberland's theatre was new and up-to-date. Miller had no shortage of product after Cumberland's theatre was built, but affirmatively testified that he

"had plenty of pictures at the price." His only complaint was that when there were two theatres in the town the film companies took advantage of the situation to cause one theatre to bid for pictures against the other, with the result that film prices went up. (Miller, R. 1037.)

(b) As to the alleged discrimination against Miller by United Artists, this distributor followed the usual policy of using a competitive situation as "leverage", that is, it forced Cumberland to buy its product in towns where it did not need the product as a condition to making a deal for Rogersville where Cumberland really needed the pictures. (Miller himself, who operated a theater at Sneedville as well as one at Rogersville, had the same experience, viz., a film company re- [fol. 341] quired him to make a deal for Sneedville as a condition to selling him at Rogersville. (Miller, R. p. 1033)). This proposition is affirmatively recognized by the Court in the fourth paragraph of finding No. 52, but when the Court comes to its conclusions, the wholly inconsistent inference is suggested in conclusion No. 17, that Cumberland exercised pressure or coercion on United Artists to make it discriminate against Miller.

(c) As to the alleged discrimination by Warner Bros. against Miller, finding No. 54 (adopted from the Government's brief) omits any consideration whatever to short subjects. The actual comparison of the film rentals received by Warner Bros. from Miller in 1936-1937 and Cumberland in 1937-1938 was as follows:

	Features	Scores	Shorts	Total
1936-37—Miller	$858.84	$145.00	$184.50	$1188.34
1937-38—Cumberland	975.00	135.00	440.50	1550.50

Clearly, Warner Bros. cannot be said to have been coerced by Cumberland where Cumberland paid so much more for the pictures than Miller had been paying.

(d) The Court has made no finding of fact and there is no evidence of any distributor to eliminate the competition of Miller and there is no finding of fact or evidence of any coercion exercised by Cumberland on any distributor, and there is no evidence that Miller

finally sold his theatre to Rockwood Amusements, Inc. as the result of anything for which Cumberland was responsible.

3. There is no evidence that Cumberland ever bought a theatre and required the seller to agree not to compete. There is no evidence that Cumberland was ever a party to any franchise agreement with any distributor. There is [fol. 342] no evidence contradicting Cowan Oldham's testimony that he (after Hill's retirement) negotiated all film deals for the Company. (Oldham testified to this effect on direct examination as a witness for plaintiff, R. 2386). In these respects Cumberland is in exactly the same attitude as Strand Enterprises, Inc., which was acquitted of all wrong-doing.

Wherefore, Cumberland respectfully submits that it is entitled to exactly the same relief as was granted its co-defendant, Strand Enterprises, Inc., viz., the suit should be dismissed against it in toto, and if Crescent Amusement Company is required to divest itself of the ownership of stock in any other corporation, there should be a specific exception of Cumberland just as in the case of Strand Enterprises, Inc.

Respectfully submitted, George H. Armistead, Jr., Dick L. Lansden, William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden. Address: American Trust Building, Nashville, Tennessee.

[fol. 343] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PETITION OF DEFENDANT, ROCKWOOD AMUSEMENT COMPANY, FOR MODIFICATIONS IN FINDINGS AND CONCLUSIONS OF THE COURT FILED MARCH 3, 1943—Filed March 31, 1943

Comes the defendant, Rockwood Amusement Company (hereinafter referred to as Rockwood), and respectfully states that in the petition filed by this defendant and others

on March 1943, there was omitted the following request for a modification in the findings of the Court, which modification said defendant now requests:

57. To the sentence "One of the principal reasons for Miller's willingness to sell his theatre was the difficulty he encountered as well as difficulty he anticipated, in securing suitable pictures for exhibition in his theatre." add (omitting the period in the present sentence "at prices he was accustomed to pay for such pictures."

In this connection, petitioner respectfully refers to the testimony of the said Miller (Rec. p. 1037) as follows:

[fols. 344-350] "Q. Well, if you had the entire product of three major companies and half the product of RKO in addition to these Monogram pictures and other independent pictures, you had plenty of pictures didn't you, Mr. Miller?

A. I had plenty of pictures at the price.

Q. Price was too high?

A. Yes, sir, but I had to buy them, I was up against it in other words when I didn't have competition I could go around and play, I could make it over and come down right you see, make them get down right, and if they didn't I could buy from the other company; after I got competition I had to buy from them, and all my letters and correspondence here shows that I did that I was trying to buy anything that I could, and pay any kind of a price to get pictures to keep my house open.

Q. In other words, when there are two theatres in a town bidding against each other, it means that the price goes up?

A. That is what it done."

Respectfully submitted, D. L. Lansden, Geo. H. Armistead, Jr., William Waller, Counsel for Defendants.

Of Counsel: Armistead, Waller, Davis & Lansden. Address: American Trust Building, Nashville, Tennessee.

[fol. 361] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF DEFENDANT, CRESCENT AMUSEMENT COMPANY, TO AMEND FINDINGS AND MAKE ADDITIONAL FINDINGS—Filed May 27, 1943

A

Comes the defendant, Crescent Amusement Company, (hereinafter referred to as Crescent), and without waiving objections to the findings and conclusions as a whole, or to such portions thereof as are not specifically referred to herein; moves the Court to amend the findings filed on March 3, 1943, and make additional findings in the respects hereinafter stated (the paragraph numbers being taken from the aforesaid findings of the Court):

Findings

39. Eliminate the last two sentences reading as follows:

> "He (Lawing) was unable to secure any other major product (R. 770) nor would any of the distributors sell him a second run; the ostensible ground of refusal was that the town was too small for a second run. But [fol. 362] the Crescent was allowed to repeat pictures which had played Lawing's theatre in Brownsville, a much smaller town." (R. 796-797)

Add the following:

> "There is no satisfactory evidence that Lawing was unable to secure sufficient product or satisfactory product on which to operate in Paris. He made no application for Universal product or for United Artists product at Paris."

(The language sought to be eliminated was adopted from the Government's brief which was a naturally partisan document in which plaintiff's counsel made references to the record for the purpose of giving plaintiff's side of controverted questions. While Mr. Lawing did testify on direct examination, in very general terms, that he was unable to secure any other major product for Paris and that none

of the distributors would sell him a second run, it is elementary that the cross-examination of a witness must be considered in connection with his direct examination and, if the two are in conflict, no weight can be given to either. On cross-examination Mr. Lawing testified as follows (R. pp. 813-815):

"Q. Now, you went to Memphis trying to get second run pictures from other companies, did you not?

A. Yes sir.

Q. Whom did you see that represented Warner Bros. in Memphis about getting second run pictures from Warner Bros.?

A. Mr. Adams, I believe at that time.

Q. Do you remember when it was that you saw Mr. Adams?

A. That I don't, no sir.

[fol. 363] Q. Whom did you see that represented Columbia in Memphis about getting second run Columbia pictures?

A. Mr. Haines and Mr. Rogers.

Q. Did you write to either of those gentlemen?

A. I don't recall writing them, no sir.

Q. Whom did you see that represented Universal about getting Universal second run pictures?

A. I don't think I made any application for Universal pictures in Paris. I understood that they were sold up there possibly on a franchise; I don't recall.

Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a con-

tract or that Paris was too small for second run operation.

Q. You say you possibly thought that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

A. Well, it is customary to call on all the companies and make every reasonable effort to get product for [fol. 364] the towns, yes sir.

Q. I say you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned."

(The language sought to be eliminated is in irreconcilable conflict with Finding No. 154 and Finding No. 172, relating to the distributor defendants.)

44. Eliminate the concluding portion of this finding, reading as follows:

"This could not possibly have been Connor's reason for rejecting Lawing's application, however, because, first, there is nothing to show that Connors ever told anyone Lawing's offer was inadequate, and second, Lawing's offer, as a matter of fact, was as good as, if not better than, the deal Loew's accepted from Crescent. Connors further explained, in justification for his decision overruling Willingham's recommendation, that he knew that Lawing's theatre was not as modern as the new Crescent Theatre, and he felt that Metro could get more money from the new theatre. This was also an afterthought, as there is no suggestion in the voluminous correspondence regarding this situation introduced in evidence by both sides that the relative merits of the theatres entered into his decision, nor [fol. 365] was there any necessity for Connors to speculate about what he could get from the two theatres because he had both offers before him, and by the simple process of comparing the two offers, he would have ascertained that from the standpoint of Loew's, the Lawing deal was as good as, if not better than, the Crescent offer."

(This language is adopted from the Government's brief and is not supported by anything in the record. It is not true that Lawing's offer was "as good as, if not better than, the Crescent offer." The Lawing application called for fifty feature pictures, with the privilege of eliminating five of the pictures. Crescent actually played forty-six of these pictures at a film rental, including score charge, aggregating $1,021.95. The Lawing application on a flat rental basis, assuming the playing of the same forty-six pictures, would have resulted in film rental of $911.50, including score charge. It is true, as contended by plaintiff, that the Lawing application called for the playing of twelve pictures on percentage, but there is no reason to assume that the difference would have been made up. Furthermore, it appears that Crescent's 1935-1936 contract provided Loews additional revenue of $575.00 from trailers, shorts and news reels. In 1934-1935, Lawing had only paid $321.00 for trailers, shorts and news reels. In 1934-1935, Lawing had played forty-one feature pictures at a total film rental of $765.69, so that Loews received a total film rental from Lawing of $1,086.69 for 1934-1935 product as compared with a total of $1,596.95 from Crescent for the 1935-1936 product. There is no indication that Crescent paid Loews any more [fol. 366] film rental than its application for 1935-1936 product called for; and there is absolutely no basis for the finding that Mr. Connors, Loew's sales manager, perjured himself when he testified as to his reasons for overruling Willingham's recommendation that Lawing's offer be accepted, viz., that "Willingham had advised him that Lawing claimed he could not pay as much for the 1935-1936 product as he had previously been paying (referring to Willingham's letter of May 28, 1925 which was introduced as Def. Ex. 51), and that Lawing's application called for less money than he felt Loew's product was worth in Brownsville." Mr. Lawing himself testified on cross-examination as follows (R. pp. 807, 808):

> "Q. With reference to the applications for Metro, did you tell the Metro salesman that you would be unable to make a new contract unless some concessions were made on the old contract?
>
> A. I think that I made some statement like that, yes sir.

Q. Did you also say that even on a new contract you couldn't pay the same film rental as you had previously paid because Mr. Sudekum's opposition had taken some of your business away?

A. I think I made a remark like that, yes sir.

Q. Well, that was true, wasn't it? I mean you weren't able to pay the same prices that you had been paying?

A. No sir, I couldn't have paid it and continued I don't believe."

[fol. 367] Certainly a distributor such as Lowes is entitled to consider short product as well as features in determining which offer to accept; and Mr. Willingham testified, in response to a question on cross-examination as to whether Loews had considerable trouble with Mr. Lawing about dating and playing news reels and other short reels and short subjects: "We always had trouble with him about the news reels and short product." (R. p. 1922)).

45. Eliminate the last paragraph, reading as follows:

"Thus, as far as the disposition of Loew's 1935-1936 product in Brownsville, Tennessee is concerned, the record shows that it was licensed to Crescent although Lawing offered Loew's at least as good a deal as the Crescent deal and was Loew's old customer in Brownsville."

(This language is adopted from the Government's brief and, as demonstrated above, is not supported by anything in the record.)

Add the following:

"Lawing's record for carrying out his contracts was very bad. He admitted on cross-examination that, even before Crescent's theatre was opened, he failed to comply with contracts with more than one distributor."

(This testimony was as follows (R. pp. 805-807):

[fol. 368] "Q. What product did you say you were using in 1934-1935 in Brownsville before the new Crescent theatre was started?

A. I was using some product from practically every company.

Q. Did you have a contract with United Artists?

A. Yes sir.

Q. For the entire output?

A. That I wouldn't be able to remember, whether it was the entire output or not.

Q. Well, did you play those pictures off in accordance with your contract?

A. I don't think that I did, no sir.

Q. Why not?

A. Well, I paid too much money for them in the first place and their exchange was in St. Louis at that time. They didn't have a Memphis office and I don't know that they have now, but the express was excessive on them and I think I paid them about $20,00 for them, for those pictures, average.

Q. And you figure that was too much so you just didn't play them?

A. I played some few of them.

Q. Do you remember when that contract was made?

A. I don't know.

Q. Did you buy any pictures from Universal?

A. During 1934-1935, I don't recall that I did, no sir.

Q. Don't you recall you bought three pictures and didn't play them?

A. From Universal?

Q. Yes.

[fol. 369] A. I really don't know.

Q. What was your experience with Columbia? Did you buy any pictures from Columbia for that season?

A. I believe I did, yes, sir.

Q. Well, did you play them?

A. I couldn't recall about that, sir.

Q. Don't you recall that as a matter of fact there were quite a number of those pictures you didn't play in accordance with the contract?

A. It seems that there was, yes, sir."

Mr. Lawing's record with Loew's was just as bad. Reference has already been made to Mr. Willingham's testimony that Loews always had trouble with Mr. Lawing about getting him to date and play news reels and other short product. (R. p. 1922). On October 25, 1935, about six weeks before Loews closed with Crescent on the 1935-1936 product, Mr. Willingham wrote to Mr. Lawing in re-

gard to his Southland Theatre (Def. Ex. 56, R. pp. 1915-1916) as follows:

"The writer has just reviewed your account and finds it to be in a most deplorable condition. I never realized until now that you are absolutely ignoring our product and not giving us any dates whatever.

"Attached is notice of availability for features and short product and if there is another account in the United States in a worse condition, we would like to know just who it might be.

"We are going to insist that you give us dates in abundance, playing two pictures per week in Brownsville, starting immediately, in order to catch up as you are so far behind this will be the only possible way you [fol. 370] can catch up on your playing arrangement.")

46. Supplement by adding the following:

"There is no evidence that Lawing had trouble getting satisfactory product or sufficient product in Brownsville. There is no evidence that he even applied for either Universal product or United Artists product after Crescent opened its theatre."

(See Findings No. 154 and No. 172).

48. In the first paragraph eliminate:

"In April 1935, Dozier entered into a contract for Paramount's 1935-1936 product which provided that Dozier was to have clearance over Madisonville, but the length of the clearance was to be decided by the N. R. A. Clearance Board at Indianapolis." (Ex. p. 16, R. 887).

In the third paragraph eliminate the words: "although it was in direct conflict with his agreement with Paramount."

(This language is adopted from the Government's brief and is not supported by anything in the record. Indeed, a footnote in the Government's brief correctly states the provision of the contract to be:

"'Run: 1st' 'Clearance: Subject to final Decision of Indianapolis Clearance Board.'"

[fol. 371] Dozier testified that at the time the contract was negotiated, Duff Newman, the Paramount salesman, told

him that Earlington would have clearance over Madisonville, but that the length of that clearance would be fixed by the Indianapolis Clearance Board (R. p. 888). Mr. Dozier's testimony about what was told him by the salesman, Mr. Newman, who was not a witness, is incompetent not only because it varies the terms of a written contract in violation of the best evidence rule, but also because, as is undisputed in the record, film salesmen had no authority to make contracts.)

63. Eliminate the second paragraph, reading as follows:

> "The deal with Sudekum referred to by Lowe was the franchise dated July 28, 1938, as of November 1, 1937. Clause 8 (e) of that franchise gave Crescent the option of playing an additional or repeat run on any picture it played first-run in Hopkinsville and all of the other towns outside Nashville where a first run was licensed. By this option Crescent was able to prevent Anderson from obtaining any second-run feature although it made no commitment to use them itself."

(This language is adopted from the Government's brief and is not supported by anything in the record. The Paramount salesman, Mr. Lowe, certainly did not know on October 11, 1937 that the Paramount franchise dated July 28, 1938 as of November 1, 1937 would contain Clause 8 (e) giving Crescent a repeat run option).

[fol. 372] 70. Eliminate the concluding portion of the first paragraph, reading as follows:

> "One reason Smith was advised that Paramount Pictures were not available to him second-run was because of the repeat-run option in the same franchise. This is clearly indicated by the following portion of Morgan's letter to Unger of November 11, 1938, which was in response to a letter from Unger to Morgan, written after Smith had complained to the Department of Justice, directing Morgan to make some pictures available for Smith. (Ex. 152):
>
> Now as regards the last paragraph of your letter about second runs, following shows the population of each town:
>
> | | |
> |---|---|
> | Morristown | 5,875 |
> | Harriman | 5,000 |
> | Newport | 2,753 |

9—662-664

In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8 of the Crescent Amusement Company franchise, provides he can repeat any feature at a certain given price."

(This language is adopted from the Government's brief and is not supported by anything in the record, and the quotation itself shows that Morgan was undertaking to justify the failure to sell Smith by giving a reason which had not previously entered into the case at all).

[fol. 373] 81. Eliminate the concluding sentence of the last paragraph, reading as follows:

"The negotiation and execution of the rider at this time showed that Crescent intended, if necessary to eliminate Henry, to operate all three theatres, and Paramount was willing to cooperate."

(This language is adopted from the Government's brief and is merely an argument. Defendants are entitled to the presumption that the rider was executed in the ordinary course of business. There was no evidence, documentary or otherwise that Crescent and Paramount had any understanding such as might be inferred from the foregoing language).

100. Eliminate the first paragraph, reading as follows:

"Curry didn't attempt to negotiate with Paramount 'because it was well understood that the Crescent Amusement Company had a first-run franchise and second-run option.' The franchise provides both a first run in Gadsden and a first run in Alabama City with a repeat-run option."

Insert in lieu thereof the following:

"Curry testified that he didn't try to negotiate with Paramount for second-run product because it was well understood that Crescent 'had a first-run franchise and a second-run option, so he didn't even have the heart to go see them.' The fact was that the Dixie Theatre already had a second-run contract with Paramount made by Curry's predecessor covering specified pictures of the 1938-1939 product, and that Crescent had

[fol. 374] a second run contract (not an option) with Paramount making a definite commitment for twenty photoplays of the 1939-1940 product, with only thirty days after first run play date to notify Paramount of its intention to use said picture for second run in one of its three Gadsden theatres. The Dixie theatre thus had full opportunity to purchase the rejected pictures and could always know, within thirty days after first run exhibition in Gadsden, whether the particular picture was available. The pictures selected by Crescent had to be played at the rate of two per month, as available, so that the Dixie theatre was not prejudiced if it desired to play these pictures on third run."

(Dixie's contract with Paramount covering specified pictures of the 1938-1939 product was introduced as Defendants' Exhibit 227; and Crescent's second-run contract covering 1939-1940 product was introduced as Defendants' Exhibit 228. The language sought to be eliminated was adopted from the Government's brief which wholly ignored these two exhibits. In the reply brief p. 59 filed by the Government, it was argued that Crescent's second-run contract had been made "after Fox had expressly called Crescent's attention to the possibility of a lawsuit where an exhibitor used a repeat-run option to keep a competitor from getting a second run." This argument was, of course, an implied concession that Curry's "understanding" about the so-called "second run option" was incorrect).

Eliminate the third paragraph, reading as follows:

"Fox, Loew, Paramount, United Artists and Warner all held the Dixie back of the Ritz, although there was no clearance provision in their contracts with the Ritz which would require them to do so. Their uniformity in holding a superior theatre behind an inferior one may only be explained by the pressure which Sudekum was able to exert on each of these distributors."

[fol. 375] (This language is adopted from the Government's brief and is not supported by anything in the record; so far as United Artists is concerned, it is in conflict with Finding No. 99; and it is in direct conflict with the testimony of Mr. Stengel, an unimpeached witness, who testified (R. p. 4726) that the theatre in East Gadsden was not mentioned in any deal with any distributor.)

Insert in lieu of said paragraph the following:

"The Dixie Theatre paid much smaller film rentals than Crescent paid with respect to the Ritz Theatre at Alabama City, which had been set up as a first-run situation when Alabama City was a separate municipal corporation, by Fox, Loews, Paramount and Warner, as well as by United Artists."

(The Dixie Theatre, which was a suburban and subsequent run situation, was unable to pay first-run prices and naturally the product did not become available for them until the first run deal had been consummated. The actual revenues received by Loew's,—the only distributor who placed in the Dixie Theatre's contract a provision that it should play subsequent to Alabama City,—were as follows (Def. Ex. 230):

	Gadsden, Ala. Princess Theatre 1st run	Alabama City, Ala. Ritz Theatre 2nd run	Gadsden, Ala. Dixie Theatre subsequent run
1938-39 (50 feature pictures)	$4,955.08 (50)	$1,602.35 (50)	$917.56 (41)
1939-40 (49 feature pictures)	2,043.36 (37)	175.00 (2)	358.48 (13)
1940-41 (35 feature pictures to and including 8-22-41)	4,632.41 (35)	1,276.62 (28)	523.40 (23)

(The figures in parenthesis indicate pictures played by each theatre.)

[fol. 376] The reason for failure of the Ritz Theatre, Alabama City, Alabama to play more than a few pictures of the 1939-1940 product was the failure of Crescent and Loew's to get together on terms for that season's product. After the 1940-1941 deal had been made, Crescent contracted for a few of the best pictures of the 1939-1940 product which were then exhibited during the 1940-1941 season.

118. Eliminate the concluding paragraph, reading as follows:

"The effect of the franchises (Ex. p. 24, p. 29, and p. 30), on the independent competition at Dresden, Earlington, Gallatin, McKenzie, Spruce Pine, Union City, Hopkinsville, Gadsden, Morristown, Harriman, Newport and Mt. Pleasant has already been recounted. Morgan, in negotiating it, knew precisely what its effect on these independent accounts would be."

(This language is adopted from the Government's brief and is a mere argument.)

119. Eliminate the first paragraph, reading as follows:

"The repeat-run clause in the franchise was completely effective in preventing the sale of a second-run of any Paramount features to any opposition theatre, as shown by the experience of Smith, Anderson and Henry when they tried to buy a second-run. As Morgan described its effect in a letter to Unger, his immediate superior, on November 14, 1939 (Ex. 152):

'In any event, the only way we could sell second-run, even if we wanted to in these particular towns, (Harriman, Morristown, and Newport) would be after Sudekum had taken the refusal, because Paragraph E of Article 8 of the Crescent Amusement Company franchise provides he can repeat any feature at a given price.'"

(The language sought to be eliminated was adopted from the Government's brief and is not supported by anything [fol. 377] in the record as has heretofore been demonstrated in connection with Findings 63, 70, and 81.)

In the second paragraph eliminate the following sentence:

"The clause, as modified, still prevents the sale of a second-run to the opposition."

(The language sought to be eliminated is adopted from the Government's brief and is pure argument unsupported by any facts in the record.)

122. Eliminate the three concluding paragraphs, reading as follows:

"But even with one theatre closed and its second-run commitment out of the way, the exhibitors obviously wished to still be in a position to prevent a competitor from getting a second run. The last paragraph giving a repeat-run option where one theatre is closed, was plainly an addition to the rider insisted upon by the exhibitors, as it confers no rights or advantages on the distributor. Unlike the Paramount repeat-run clause, this option was so worded as to make the repeat-run subject to such other runs in the

same town as the distributor might license. The only purpose that this clause could serve was to make it difficult for Warner to license a second-run theatre in opposition to Crescent after Crescent shut one theatre and got rid of its second-run commitment.

"The purpose of the repeat-run option was plainly to replace the second-run commitment as a means of [fol. 378] tying up second-run in the situations where that commitment was subject to elimination upon closing a theatre, as in the situations where no second-run commitment was made, a straight repeat-run privilege was inserted which does not depend on the closing of a theatre to take effect. Thus in Harriman and Morristown, where Crescent was also operating two theatres, but no second-run commitment was made, the repeat-run clause reads as follows:

'KCS. [In the event one theatre closes] * Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Harriman, Tennessee, and in such event the exhibitors commitment to exhibit such features in the lowest rental classification shall be reduced accordingly.'

"The only difference between this and the repeat-run clause previously quoted is in the stricken opening phrase: 'In the event one theatre closes'. In all of the one-theatre situations in which no second run was bought, the same unqualified repeat-run clause as that stated above was used."

* Struck out in copy.

(The language sought to be eliminated is adopted from the Government's brief and is pure argument unsupported by any facts in the record. In towns where there were two theatres, e.g., Lebanon, Tennessee, there was always the possibility that, because of lack of patronage, it would be advisable to close the second theatre; and it was perfectly natural for defendant exhibitors to contract for a reduction in their commitments under such circumstances. The repeat-run provision in the Warner franchise permitted the exhibitor to repeat a picture which turned out to be a

better attraction than previously expected, but without the necessity of negotiating all over again as to the price to be [fol. 379] paid the distributor, and to repeat such picture in lieu of an inferior picture which the exhibitor would otherwise have been required to play. The second-run deals, on the other hand, were definite commitments for a specified number of pictures. There is not even a contention by the Government that the repeat-run clause in the Warner franchise ever prevented any independent exhibitor from getting pictures, or that any independent exhibitor would not have been privileged to exhibit product on second run prior to any such repeat runs by defendant exhibitors.)

127. Eliminate the next to the last paragraph, reading as follows:

> "Even though the independents in the towns where there was then opposition, Earlington, Gadsden, Maryville, Paris and Hartselle, paid Fox more than it received from Sudekum, the total revenue from them added up to only 'about seven or eight thousand dollars.' The Sudekum franchise offered a total rental of better than $120,000.00 for all situations for the three years' product and that being the case, this product was sold away from the independent exhibitors at the 'opposition points', who had bought the 1935-36 product, without giving them any opportunity to negotiate for the next season. Everyone of these independents, who paid more than Sudekum in their individual situations but could not collectively match his total Circuit purchase, was eventually taken over by Crescent or Rockwood before the expiration of the franchise in August, 1939."

(The language sought to be eliminated is adopted from the Government's brief except that the Government, in its brief, put in quotations the words "than we have received from Tony", whereas the Court omitted the quotations and changed "Tony" to "Sudekum". The quotation is from a letter filed as Government's Exhibit 205, being a letter dated March 13, 1936 from the Atlanta District [fol. 380] Manager of Fox to the New York Sales Manager of that Company giving reasons for making a deal toward the end of the season with Crescent for towns in which

Crescent had no opposition. Fox had already sold the opposition in all competitive situations, and was selling Crescent only half of the 1935-1936 product referred to as "K-3 product". The paragraphs in the letter, which are the basis of the argument in the Government's brief, read as follows:

"As you know we have had a great deal of difficulty with the Sudekum Circuit and the procedure in the past has been such that we almost had to take anything that Sudekum wanted to give us. I have been on the verge of splitting with him a time or two, but could not see that I was gaining anything, so always late in the season would take rather unsatisfactory deals.

"However, this year, after repeated efforts to get together with him on any kind of a deal that would show an improvement over anything we received in the past, I closed up and called it a day and attempted to salvage what money I could from a few opposition points, thinking that maybe with Fox out some opposition would open up. He has opposition in the towns of Gadsden and Maryville in the Atlanta territory and in the Memphis territory he has opposition in Paris, Tennessee. In the Indiana territory, they sell a little bit of a town outside of Madisonville, called Earlington, which George Landis advised me he received a very satisfactory contract from for the K-3 product. In Decatur he has opposition in a town called Hartselle, which we have sold, but this is all we could salvage; I imagine the whole thing amounted to about seven or eight thousand dollars.

"Since I have sold away from Tony, he has evidenced some desire to get together with us in the future and while it is too late to sell him in some of his spots this year, we have worked out a deal that I think is excellent. I am sending you a recap of the money that we have received, which includes all of the towns in his circuit, for which he buys direct, (he still owns half interest in the Hill Circuit, but this is a separate Corporation). This shows the gross total of $24,745.50.

"Briefly, the deal is this:—he is to give us $20,000.00 for half of the K-3 product, but deducting from this, the money that he would normally allocate against the towns where we have already sold. In other words,

we only sell him half of the K-3 product, but in view of the fact that we receive more from these towns than we have received from Tony, the deal will probably run up to considerably more than $20,000.00 for the K-3 product.

. . . . . .

[fol. 381] "I would appreciate your giving me your thoughts in the matter, or anything else you might want to add to this, but I would like to get it operating as quickly as possible. These are all very small towns, no opposition and some of them are pretty bad looking propositions insofar as gross returns are concerned, although a few of them are pretty good. I do not think I could ever do any better and I am quite sure that I could not go up there 'cold' and sell him next year's product at $40,000.00".

Although Mr. Ballance was introduced as a Government witness and testified that he wrote this letter, he was not asked to explain it in any way or to verify any statements of fact contained in the letter. Clearly the letter is not a proper basis for a finding that any independent exhibitor paid more than Sudekum in any individual situation.)

Eliminate the concluding paragraph, reading as follows:

"Hendren's letter of February 7, 1936 (Ex. 258), indicates that if he could have gotten the Fox 1936-37 product he would have discontinued negotiations with Sudekum for the sale of Maryville and Greenville. For the 1935-1936 feature product in Maryville, he paid $2,456.61 as against $570.00 paid by Crescent for the 1934-35 feature product and $1,080.00 paid by Crescent for the 1936-37 feature product (Ex. 327) in the same town. For the 1935-36 feature product in Greenville he paid $2,589.00 against $1,095.00 paid by Crescent for 1937-38 (Ex. 328)."

(The language sought to be eliminated is a footnote in the Government's brief. Government's Exhibit 258, which is referred to, was a request for 1935-1936 Fox product which was actually sold to Parrott & Hendren. In the [fol. 382] course of this letter Hendren also said that "the present negotiations *might* be discontinued" if Fox would "*immediately*" state that the pictures were available to

them for "an additional year in Greenville". What Hendren may have said to Fox in the course of negotiations for a film deal is not a proper basis for a finding in conflict with Hendren's actual testimony, on direct examination by Government counsel, that the question of product had nothing to do with the deal between Parrott & Hendren and Crescent. (He testified that "that didn't enter into it" (R. 353); and there was no evidence to the contrary.)

133. Eliminate the first two sentences, reading as follows:

> "One obvious purpose of all three franchises was to give Fox, Warner, and Paramount an ostensibly valid legal excuse for discriminating in favor of the Sudekum circuit in licensing its films during the period covered in the same manner that they had discriminated in the past. The Sudekum circuit, by virtue of having built up a preponderance of closed situations, through the persistent elimination of competition, was in a position to deal effectively with such competition as remained or might arise in the future, in making one-year film deals, but franchises offered protection against future changes in those discriminatory practices."

(The language sought to be eliminated is adopted from the Government's brief and is a mere argument which is not supported by any facts in the record. Executives of the three distributors all testified that the initiative for making these franchises came from the distributors, and not from defendant exhibitors; and that their reasons were to insure a continuous outlet for their respective products. A long-term deal is an advantage to the party who makes the correct guess as to the trend, just as in the case of a long-term lease of real estate.)

[fol. 383]

B

Defendant, Crescent Amusement Company, to the extent that it is or may be affected by findings relating more specifically to its co-defendants or any of them, adopts and relies upon all motions and petitions filed by any of said co-defendants in which modifications or amendments of the findings and or conclusions are sought, with the same effect as if fully copied herein.

C

Defendant excepts not only to the findings hereinbefore specifically referred to, but to all findings and parts of findings adopted from the Government's brief and to the conclusions based upon such findings, upon the ground that the method thus used was improper and unfair to defendant exhibitors and did not constitute a weighing of the evidence by the Court. A copy of the Government's said brief is filed herewith as a part of these motions and reference made to same for purposes of comparison. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.

D

Defendant further excepts to all findings and parts of findings predicated upon unsworn statements, either written or oral, made by employees of distributors and other third persons, upon the ground that such unsworn statements are both heresay and *res inter alios acta*. Defendant accordingly moves the Court to amend the findings filed March 3, 1943 by eliminating all such findings and parts of findings.

[fols. 384-439] E

Defendant further moves the Court to amend the conclusions of law and decree consistently with the amendments to findings and additional findings hereinbefore sought.

William Waller, Geo. H. Armistead, Jr., D. L. Lansden, Address: American Trust Building, Nashville, Tennessee, Counsel for Defendant, The Crescent Amusement Company.

[fol. 440] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTIONS, AND NOTICE THEREOF, OF DEFENDANTS TO STRIKE PORTIONS OF COMPLAINT, ETC.—Filed September 30, 1939

To the Honorable Horace Frierson, Jr., United States District Attorney, Custom House, Nashville, Tenn.

SIR:

Please take notice that the undersigned, McConnico, Armistead, Waller & Davis, attorneys for the moving defendants herein, will bring the following motions on for hearing before this Court in Nashville, Tennessee, on the 6th day of October, 1939, at 9 A. M., of that day, or as soon thereafter as counsel can be heard.

I

The defendants herein, The Crescent Amusement Company (erroneously sued as Crescent Amusement Company, Inc.), Lyric Amusement Company, Inc., Nu-Strand Corporation (erroneously sued as New Strand Company), Cumberland Amusement Company, Strand Enterprises, Inc. (erroneously sued as Strand Enterprise Corporation), Rockwood Amusements, Inc., Cherokee Amusements, Inc. (erroneously sued as Cherokee Amusement Company, Inc.), Kentucky Amusement Co., Inc. (erroneously sued as Kentucky Amusement, Inc.), Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united in this motion for the convenience of the Court, will move this Court at the time and place stated above as follows:

To require plaintiff to recast paragraphs 45-55, inclusive, of the complaint so as to alleviate the defects hereinafter pointed out, or, on failure of plaintiff so to do, to strike the said paragraphs and or dismiss the complaint, upon the ground and for the reason that the allegations of said paragraphs, when treated together, are so repugnant, vague and obscure that defendants are unable to determine the theory or theories upon which plaintiff predicates the

averments that defendants have violated Sections 1 and 2 of the Sherman Act, especially in that:

[fol. 441] 1. Under the allegations of paragraphs 45-49, inclusive, plaintiff would be at liberty to show numerous combinations with different parties, with different objects and employing different means, none of which are specifically and definitely averred in the complaint; and under the allegations of paragraphs 50-53, plaintiff would again be at liberty to show numerous combinations with different parties, with different objects and employing different means, none of which are specifically and definitely averred in the complaint;

2. It is alleged in paragraph 48 that the defendant exhibitors combined to "compel" the defendant distributors to grant them exclusive privileges, whereas in paragraphs 51 and 52 it is alleged that the different distributors "followed the policy" of granting said exclusive privileges to said defendants exhibitors; and said statements of plaintiff's claim are not set forth alternately or hypothetically.

3. It can not be ascertained from said paragraphs 45-55 of the complaint whether plaintiff intends to contend, either conjunctively or alternately or hypothetically:

(a) That a monopoly of theatres by the defendant exhibitors has resulted in a monopoly of the supply of feature films by said defendant exhibitors; or

(b) That a monopoly of theatres by the defendant exhibitors has had the effect of unreasonably restraining interstate trade and commerce in films; or

(c) That a monopoly of the supply of feature films by the defendant exhibitors has been accomplished as a means of enabling said defendant exhibitors to monopolize the theatres; or

(d) That the defendant exhibitors and distributors have combined to restrain interstate trade and commerce in films as a means of enabling the defendant exhibitors to monopolize the theatres.

II

Defendants move the Court, in any event, to strike paragraph 54 of the complaint, because the averments thereof are redundant and/or immaterial and impertinent, in that (a) the said paragraph 54 in part repeats the substance of paragraph 49, and (b) the remainder of the said paragraph 54 avers the employment of strictly local means to accomplish a strictly local object, viz., a monopoly of the business of operating motion picture theatres in various towns or [fol. 442] areas, and the matters so averred do not come under the ban of the Sherman Anti-Trust Law.

III

Defendants state that certain allegations and averments of the complaint, which are hereinafter designated, have not been set forth with sufficient definiteness or particularity to enable defendants properly to prepare their responsive pleading or to prepare for trial, and hence defendants move the Court to require of plaintiff, in the respects hereinafter specified, a more definite statement of the complaint or a bill of particulars:

1. As to paragraph 43: Specify the theatres whose operation was taken over and the other theatres which were kept closed, and the time kept closed, and as to each theatre, specify the manner in which control over the licensing of feature pictures was exercised by the defendant exhibitors to enable them to take over the theatre or to keep the theatre closed.

2. As to paragraph 45?

(a) Specify the parties to each combination intended to be alleged, the time and place when each combination was effected, and the agent or agents through whom each combination was effected;

(b) Specify the object or objects of each combination, the means employed to accomplish each object, and the agent or agents who participated, and the manner of such participation, in the employment of each means;

(c) Specify whether the phrase "in the following manner" is intended to modify the verb "combined" or the verbs "restrain" and "monopolize";

(d) Specify the nature and extent of each restraint upon interstate trade and commerce intended to be averred and how the restraint was accomplished; and as to each restraint, specify whether it was itself the object of a combination, or was a means employed in accomplishing another object, and if the latter, specify what the other object was, and in either event, specify the parties to the combination;

(e) Specify the names of the "other towns" referred to.

3. As to paragraph 46:

(a) Specify, as to each of the alleged "agreements to allocate," the towns involved in the agreement, the date of the agreement, the parties to the agreement, whether the agreement was oral or in writing, and if oral, the names of the agents through [fol. 443] whom the agreement was made and the substance thereof, and if in writing, furnish a copy thereof;

(b) Specify the names of any of "said towns" which plaintiff intends to allege were large enough for profitable operation of a competing motion picture theatre or theatres, and as to each such town specify the classes of films which, according to plaintiff's contention, the additional theatre or theatres might profitably exhibit under non-monopolistic conditions;

(c) Specify how the alleged agreements to allocate territory operated unreasonably to restrain interstate trade and commerce in motion picture films, if this was intended to be averred, or how they operated to monopolize the exhibition of motion pictures and operation of motion picture theatres, if this was intended to be averred.

4. As to paragraph 47:

(a) Specify the basis and meaning of the averment that the "purpose" of the exhibitors, in contracting in advance for feature pictures, was to control and monopolize the supply thereof, giving sufficient details to apprise defendant as to what plaintiff in-

tends to show in support of this averment as to the unlawful purpose of contracting in advance for feature pictures;

(b) Specify the feature pictures and the exhibitors referred to by plaintiff in the clause "before such feature pictures, or any of them, have been offered to any other exhibitor in the said towns," if plaintiff intends to show that any particular feature pictures were not offered to any particular exhibitors.

5. As to paragraph 48:

(a) Specify whether the phrase "by said contracts" is intended to modify the verb "combined" or the verb "compelled";

(b) Specify the methods and means used by the exhibitors to "compel" the distributors to grant them the exclusive privileges mentioned, and the times and places when each method or means was used, and the name of the persons representing each party involved;

(c) Specify whether the exclusive privileges referred to were granted in writing or orally, and if they were granted in writing, furnish copies of the documents, and if they were granted orally, specify when and where they were granted and the names of the persons representing each party involved;

[fol. 444] (d) Specify the towns referred to as "said towns" and specify the "other exhibitors" referred to in paragraph 48 (a) and the "competing theatres" referred to in paragraph 48 (b).

6. As to paragraph 49: Specify the "other theatre operators in said Crescent towns" who offered competition which was either restrained, suppressed or eliminated; and the particular manner or manners in which the competition of each of them was restrained, suppressed or eliminated, and the time when each restraint, suppression or elimination was effected.

7. As to paragraph 50:

(a) Specify the parties to each combination intended to be alleged, the time and place when each

combination was effected, and the agent or agents through whom each combination was effected;

(b) Specify the object or objects of each combination, the means employed to accomplish each object, and the agent or agents who participated, and the manner of such participation, in the employment of each means;

(c) Specify whether the phrase "in the following manner" is intended to modify the verb "combined" or the verbs "restrain" and "monopolize";

(d) Specify the nature and extent of each restraint upon interstate trade and commerce intended to be averred, and how the restraint was accomplished; and as to each restraint, specify whether it was itself the object of a combination, or was a means employed in accomplishing another object, and if the latter, specify what the other object was. In either event specify the parties to the combination.

8. As to paragraph 51: Specify the basis and meaning of the averment that the "purpose" of the distributors, in contracting in advance for feature pictures, was to permit the exhibitors to control and monopolize the supply thereof, giving sufficient details to apprise defendant as to what plaintiff intends to show in support of this averment as to the unlawful purpose of contracting in advance for feature pictures, and specifying each and every "other exhibitor in said towns."

9. As to paragraph 52: Specify the "other exhibitors in said towns."

10. As to paragraph 53:

(a) Specify the form and substance of each and every communication from any defendant exhibitor [fol. 445] to any defendant distributor referred to by the phrase "at the instance and request of," giving the time, place and name of agents representing each party;

(b) Specify whether the "agreements" referred to were oral or in writing, and if oral, the names of the agents through whom each agreement was made and

the substance thereof, and if in writing, furnish a copy of each agreement;

(c) Specify the "competing exhibitors" and the "competitors of defendant exhibitors."

11. As to paragraph 54, (unless same is stricken pursuant to another motion of defendants this day filed):

(a) Specify whether it is intended to be averred that the elimination of independent exhibitors was a result of, or a cause of, the alleged control by the exhibitors of the most desirable motion pictures;

(b) Specify the independent exhibitors who were induced to sell their theatres, the agents of the defendant exhibitors who made the threat, when and where each of said threats was made and to whom it was made; and if a threat was implied, specify the acts from which the threat was implied, and if a threat was express, specify the words which were used;

(c) Specify the instances when and where independent exhibitors found it impossible to procure sufficient pictures to keep their theatres in operation, the pictures they tried and failed to procure, and the terms and times of the respective offers made for pictures which any such independent exhibitor tried and failed to procure;

(d) Specify the basis and meaning of the averment that the "purpose" of the defendant exhibitors in giving away prizes and operating theatres at a loss was "driving their competitors out of business"; and specify the theatres alleged to have been operated at a loss and the periods of such operation;

(e) Specify each independent exhibitor driven or forced out of business by the use of any of the alleged tactics, and the particular tactics used by the defendant exhibitors in each instance, and the times and places of the use of such tactics and of the driving or forcing out of business of such independent exhibitor.

(f) Specify the independent exhibitors who will be forced out of business, or are in any danger of

[fol. 446] being forced out of business, if defendant exhibitors are not restrained and enjoined by the court, giving the names and locations of the theatres referred to.

12. As to paragraph 55:

(a) Specify whether it is intended to be averred that the acquisition and operation of numerous theatres by the defendant operators was a result of, or a cause of, the alleged control by defendant exhibitors of the most desirable motion pictures, as previously set forth;

(b) Specify what is meant by the phrase "circuit-buying power"; and, in particular, specify whether plaintiff intends any legal distinction between the buying power of one hypothetical owner of a certain number of theatres and the buying power of several hypothetical owners who in the aggregate own the same number of theatres, but who have combined for the purpose of collective bargaining with the distributors;

(c) Specify which of the various "manners" set forth in the complaint is referred to by plaintiff in the use of the phrase "in the manner herein set forth," and which section of the Sherman Act plaintiff intends to aver was violated by the use of so-called "circuit-buying power."

Defendants further move the Court for an order directing that as to such paragraphs of this motion, or of any items thereof, as to which the plaintiff shall state in its bill of particulars that it has no knowledge or information or incomplete knowledge or information, the plaintiff furnish the moving defendants in its bill of particulars whatever knowledge or information it may have and furnish further particulars within thirty days after it has obtained further knowledge or information, and, in any event, not later than thirty days before trial.

IV

Defendants further move for an order extending the time of the defendants herein to answer the petition, until sixty (60) days after service upon the attorneys for the defend-

ants of a copy of a more definite statement and of the bill of particulars directed to be furnished by the order to be entered upon this motion, or, in the event that this motion for a more definite statement and for a *bill of particulars* be denied in all respects, until sixty (60) days after service upon the solicitors for such defendants of a copy of the order denying such motion with notice of entry thereof.

[fol. 447] V

Defendants further move for an order granting the moving defendants such other and further relief as may be deemed just and proper in the premises.

McConnico, Armistead, Waller & Davis; George H. Armistead, Jr., Attorneys for Moving Defendants. American Trust Building, Nashville, Tennessee.

[fol. 448] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

OPINION ON VARIOUS MOTIONS—Filed February 23, 1940

This case is before the Court upon several separate motions, filed by various defendants for an order requiring plaintiff to furnish a more definite statement and a bill of particulars, and other matters, which will be acted upon separately.

The defendants, Loew's Incorporated, Warner Brothers Pictures, Incorporated, Vitagraph, Incorporated, Paramount Pictures Incorporated, Paramount Film Distributing Corporation, and Twentieth Century Fox Film Corporation, have filed identical motions, and for the purpose of this opinion, these motions will be treated as one.

The defendants, Columbia Pictures Corporation, United Artists Corporation, Universal Pictures Company, Incorporated, and Universal Film Exchanges, Incorporated, have filed a joint motion, as have also the defendants, Crescent Amusement Company, Lyric Amusement Company, New Strand Company, Cumberland Amusement Company, Strand Enterprises, Incorporated, Rockwood Amuse-

ments, Incorporated, Cherokee Amusement Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, hence this matter will be disposed of as if upon three separate motions.

The first two motions hereinabove referred to relating only to requiring plaintiff to furnish a more definite statement and a bill of particulars, will be considered together, and in conjunction with Division III of the third motion. [fol. 449] It is insisted by counsel for the plaintiff that the motions should be overruled, and the defendants required to seek the information desired by serving interrogatories on plaintiff, as provided for in Rule 33. Upon due consideration thereof, the Court is of the opinion that interrogatories as provided for under Rule 33, are not considered as a preliminary step in the formation of pleadings but may be utilized for the purpose of obtaining evidentiary matters, after pleadings have been formulated; and likewise, information sought on evidentiary matters obtainable by interrogatories may not properly be obtained by a bill of particulars. Wisconsin Alumni Research Foundation vs. Vitamen Technologist, Inc., D. C. S. D. California, December 9, 1939.

The Court is therefore of the opinion that the proper method of obtaining a more definite statement of facts not averred with sufficient definiteness or particularity, in the original complaint to enable defendant to properly prepare his responsive pleadings, is by a motion for a more definite statement or for a bill of particulars under Rule 12 (e), and this view has apparently been adopted by a large number of courts throughout the country. To hold otherwise would be placing a limitation upon the function of the new rules, not contemplated in their formulation, and would not be given that liberal construction necessary for their successful application. The motions in question are rather voluminous and contain demands for particulars of numerous items; the Court has considered each item separately, and in the light of what would be necessary for the purpose of answering the complaint. A large number of the particulars demanded are obviously evidentiary in character and should not be granted. The motions for these demands will, therefore, be granted in part and denied in part, and separate orders have been prepared indicating the action

of the Court upon such request. These orders will be filed with this opinion, and will dispose of the two motions referred to in the motion of Loew's Incorporated, et al., and the motion of Columbia Pictures, Corporation, et al.

[fol. 450] The motion of the Crescent Amusement Company, et als., will next be considered. The First Division of the motion seeks to require plaintiff to recast paragraphs 45 to 55 inclusive, for the reason that the allegations of said paragraphs, when treated together, are so repugnant, vague and obscure that defendants are unable to determine the theory or theories upon which plaintiff predicates the averments that defendants have violated Sections 1 and 2 of the Sherman Act. The Court is of opinion that the objection set forth in this Division of the motion will largely be eliminated by the action of the Court in granting the requests for the bill of particulars, and such as are not, the Court does not feel are sufficient to require plaintiff to recast the objectionable paragraphs. This Division of the motion, will, therefore, be denied.

In the Second Division of the motion, defendants, under Rule 12 (f) move to strike paragraph 54 of the complaint, the material part of which is the objection that a part of the paragraph avers the employment of strictly local means to accomplish a strictly local object, that is, a monopoly of the business of operating Motion picture theatres in various towns or areas, and that the matters so averred do not come under the ban of the Sherman Anti-Trust Law. The particular averments in paragraph 54 to which this ground of the motion is directed are as follows:

> "In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes and operated some of their theaters at a loss with the purpose and effect of driving their competitors out of business and giving defendant exhibitors a monopoly in the exhibition of motion pictures in the area in which they operate."

Of course, the lowering of prices, giving away large sums of money as prizes, and operating theaters at a loss are of a purely local nature; it is not averred that these acts were committed by the defendant exhibitors pursuant to a conspiracy entered into with the defendant distributors. While of course, motion pictures shown at local theaters are

shipped in interstate commerce to the exhibitor; yet, after [fol. 451] the film comes to rest at its point of delivery, the showing of the picture and the operation of the theater is purely a local matter, and it is not averred in the complaint that the acts complained of have in any way diminished the shipment of films in interstate commerce, nor have the particular acts resulted in a monopoly of the supply of motion picture films. The monopoly complained of must be such as to restrain or unduly burden interstate commerce. The Court is of opinion that such local acts in themselves, not alleged to have been part of a conspiracy for the purpose of restraining interstate commerce, do not directly restrain and burden interstate commerce, and the Court does not regard the acts alleged as creating a direct and substantial burden on interstate commerce. Blumenstock Brothers Advertising Agency vs. Curtis Publishing Company, 252 U. S. 436; Foster & Kleiser v. Special Site Sign Company, 85 Fed. (2d) 742; Ewing-Von Allmen Dairy Co., Inc., vs. C. & C. Ice Cream Company, Inc., 8089 U. S. C. A. Sixth Circuit, February 15, 1940. Leave to amend not having been asked, the motion of defendant is therefore granted as to that part of paragraph 54 above indicated.

As to Divisions Three and Four, being a request for a bill of particulars, these Divisions are granted in part and denied in part, as indicated in an order filed herewith.

This the 21st day of February, 1940.

Elmer D. Davies, Judge.

[fol. 452] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ON MOTIONS OF CRESCENT AMUSEMENT CO., ET AL.—Filed February 23, 1940

This cause came on to be heard upon motion of the defendants Crescent Amusement Company, Lyric Amusement Company Incorporated, New Strand Corporation, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Incorporated, Cherokee Amuse-

ment Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, for an order to require plaintiff to recast certain paragraphs in the original, and to strike paragraph 54 thereof, and for a more definite statement and a bill of particulars, with respect to the matters set out in said motion.

Upon consideration thereof it appears to the Court that said motion is proper and should be granted in part. It is therefore ordered, adjudged and decreed by the Court that the several requests made by the said defendants in their motion are hereby either granted or denied, as hereinafter indicated.

I. Denied: II. granted by striking from paragraph 54 of the original complaint the following: "In addition defendant exhibitors have lowered their prices, given away large sums of money as prizes, and operated some of their theatres at a loss with the purpose and effect of driving their competitors out of business, and giving defendant exhibitor a monopoly in the exhibition of motion pictures in the area in which they operate;" III. 1, granted: III. 2. (a), denied for the reason that practically the same mo- [fol. 453] tion was granted on motion of defendant Loew's Incorporated, V, as fully as deemed necessary: III. 2. (b) denied: III. 2, (c) denied: III. 2, (d) denied: III. 2, (e) granted: III. 3, (a) denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated VII, as fully as deemed necessary: III. 3, (b) denied: III. 3, (c) denied: III. 4, (a) denied: III. 4, (b) denied: III. 5, (a) denied: III. 5, (b) denied: III. 5, (c) denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated VIII, as fully as deemed necessary: III. 5, (d) granted: III. 6, granted; III. 7, (a) denied: III. 7, (b) denied: III. 7, (c) denied: III. 7, (d) denied: III. 8, denied for the reason that practically the same motion was granted on motion of Columbia Pictures Corporation, XXIII, as fully as deemed necessary: III. 9, granted: III. 10, denied for the reason that practically the same motion was granted on motion of defendant Loew's Incorporated, XII: III. 10, (b) denied: III. 10 (c) denied: III. 11, denied: III. 12, denied:

It is further ordered, adjudged and decreed, that the plaintiff, United States of America, shall be allowed forty-

five (45) days from the date of entry of this decree, within which to prepare and file its bill of particulars as hereinabove indicated, and that each defendant shall have forty-five (45) days from the time of filing of said bill of particulars within which to prepare and file its answer to the complaint in this cause.

Elmer D. Davies, Judge.

[fol. 454] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES.

[Title omitted]

BILL OF PARTICULARS—Filed May 22, 1940.

The United States of America, petitioner herein, hereby files the following bill of particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Incorporated, New Strand Corporation, Cumberland Amusement Company, Strand Enterprise Corporation, Rockwood Amusements, Incorporated, Cherokee Amusement Company, Incorporated, Kentucky Amusement Incorporated, Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel in accordance with the order of the court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. Petitioner is unable to furnish at this time a complete list of all theatres which defendant exhibitors have taken over and kept closed during the past five years. Among such instances, however, have been the following:

Time: 1938.
Place: Spruce Pine, North Carolina.
Theatre: Piedmont.
Independent Exhibitor: J. A. Taylor.
Defendant Exhibitor: Cherokee Amusement Company.
Distress. Methods and Manner Employed: Defendant exhibitor constructed competing theatre. Independent exhibitor was forced to sell because of threat that he would be unable to procure sufficient product to operate in the future.

[fol. 455] Time: 1937.

Place: Newport, Tennessee.

Theatre: Winston.

Independent Exhibitor: J. W. Baird.

Defendant Exhibitor: Newport Amusement Company which is affiliated with Crescent Amusement Company through stock ownership.

Distress Methods and Manner Employed: Independent exhibitor was forced to sell fifty per cent interest in his theatre under threat that defendant exhibitors would open competing theatre and deprive him of product.

Time: September 1938.

Place: Rogersville, Tennessee.

Theatre: Palace.

Independent Exhibitor: William P. Miller.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor built a new theatre, cut prices and began to show double features. Independent exhibitor had difficulty getting desirable pictures and was forced to sell.

Time: 1935.

Place: Coal Creek, now known as Lake City, Tennessee.

Theatre: Name unknown.

Independent Exhibitor: Sam Key.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat of opening competing theatre and running independent out of business.

[fol. 456] Time: 1937.

Place: Oneida, Tennessee.

Theatre: Name unknown.

Independent Exhibitor: Ed Zumstein.

Defendant Exhibitor: Cherokee Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor leased theatre from under independent exhibitor and forced him out of business.

Time: June 1939.

Place: Union City, Tennessee.

Theatre: Roxy.

Independent Exhibitor: John D. Henry.

Defendant Exhibitor: Unable to give name of defendant exhibitor, but it was one of the defendant exhibitors named in the complaint operating under the direction and control of defendant Sudekum.

Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

Time: August 1939.
Place: Earlington, Kentucky.
Theatre: Roxy.
Independent Exhibitor: E. W. Dozier.
Defendant Exhibitor: Rockwood Amusement Company.
Distress Methods and Manner Employed: Defendant exhibitor opened a second competing theatre and began to cut prices. Independent exhibitor had trouble procuring pictures and was forced to sell.

[fol. 457] Time: December 1937.
Place: Central City, Kentucky.
Theatre: Empress.
Independent Exhibitor: F. M. Pittman.
Defendant: Rockwood Amusement Company.
Distress Methods and Manner Employed: Defendant Exhibitor opened competing theatre. Independent exhibitor was unable to compete with the purchasing and booking power of defendant exhibitor chain.

Time: December 1938.
Place: Hopkinsville, Kentucky.
Theatre: Kentucky.
Independent Exhibitor: V. R. Anderson.
Defendant Exhibitor: Anthony Sudekum.
Distress Methods and Manner Employed: Defendant exhibitor engaged in price cutting, had bank nights and family nights, stage shows and the like. Independent exhibitor had trouble getting pictures and was forced to sell.

Time: January 1938.
Place: Providence, Kentucky.
Theatre: Lido.
Independent Exhibitor: Walter Beymer.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Threat by defendant exhibitor to open competing theatre and withhold

product caused bank to call loan on independent's theatre and made it necessary for him to sell.

[fol. 458] Time: September 1938.

Place: Greenville, Kentucky.

Theatre: Palace.

Independent Exhibitor: William G. Head.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat to construct competing theatre and withhold product.

Time: June 1939.

Place: Copperhill, Tennessee.

Theatre: Cherokee.

Independent Exhibitor: Cherokee Theatre, Incorporated.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Threat of opening a competing theatre and running independent exhibitor out of business.

Time: June 1936.

Independent Exhibitor: Hendren and Parrott Amusement Company.

Theatres: Capital and Lyric.

Place: Erwin, Tennessee.

Theatre: Strand.

Place: Mountain City, Tennessee.

Theatre: Gay.

Place: Sweetwater, Tennessee.

Theatre: Grand.

Place: Lenoir City, Tennessee.

Theatre: Cherokee.

Place: La Follette, Tennessee.

Theatre: Capitol.

Place: Oneida, Tennessee.

Theatre: Park.

Place: Maryville, Tennessee.

Theatres: Princess and Palace.

Place: Greenville, Tennessee.

[fol. 459] Distress Methods and Manner Employed: Independent exhibitor forced to sell fifty per cent interest in all its theatres under threat that Crescent Amusement Company would build competing theatres in every town where independent exhibitor operates and run independent out of business.

Time: August 1936.

Place: Guthrie, Kentucky.

Theatre: Lyric.

Independent Exhibitor: John N. Allison.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatre and running independent out of business.

Time: 1938.

Place: Lawrenceburg, Tennessee.

Theatre: Princess.

Independent Exhibitors: Mrs. H. L. Thulander, Lewis Rhulander, Helen Rhulander, Mrs. Cowan Oldham.

Defendant Exhibitor: Cumberland Amusement Company.

Distress Methods and Manner Employed: Independent exhibitor sold fifty per cent interest in Princess at Lawrenceburg, Tennessee, under threat that competing theatre would be opened.

Time: April 1939.

Place: McKenzie, Tennessee.

Theatre: McKenzie.

Independent Exhibitor: Y. Douglas Moore.

Defendant Exhibitor: Rockwood Amusement Company.

Distress Methods and Manner Employed: Defendant exhibitor leased a building in the town and threatened to open competing theatre and run independent exhibitor out of business.

[fol. 460] Time: 1940.

Place: Athens, Alabama.

Theatre: Bama.

Independent Exhibitor: M. M. Buchanan.

Defendant Exhibitor: Name unknown.

Distress Methods and Manner Employed: Defendant exhibitor cut prices, gave away prizes and prevented independent from procuring pictures. Independent was forced to sell.

Petitioner is unable to state when any of the theatres listed above were closed or the periods during which they were kept closed.

2(e). The other towns referred to in paragraph 45 of the complaint means every town in Tennessee, Kentucky, Alabama, and Arkansas where an independently owned theatre is being operated.

5(d). The term "said towns" in paragraph 48(a) means the towns where the Crescent defendants operate theatres.

Petitioner is unable at this time to furnish a complete list of such towns. Those that petitioner is able to supply are set forth in paragraphs 1 to 9 of the complaint.

Petitioner is unable to furnish at this time a complete list of "other exhibitors" referred to in paragraph 48(a) and of "competing theatres" referred to in paragraph 48(b). Among them are the following:

William Roth—Gallatin, Tennessee.

Ray Smith—Murfreesboro, Tennessee.

Peerless Enterprises, Inc.—Newport, Morristown, and Harriman, Tennessee.

Parrott and Hendren Amusement Co.—Erwin, Mountain City, Sweetwater, Lenoir City, La Follette, Oneida, Maryville, and Greenville, Tennessee.

John D. Henry, Union City, Tennessee.

Thomas R. Jones and Garland C. Jones—Franklin, Kentucky.

E. W. Dozier—Earlington, Kentucky.

[fol. 461] W. G. Head—Greenville, Kentucky.

Ray Smith—McMinnville, Tennessee.

William P. Miller—Rogersville, Tennessee.

J. A. Taylor—Spruce Pine, North Carolina.

M. M. Buchanan—Athens, Alabama.

6. Petitioner is unable to furnish at this time a complete list of theatre operators whose competition was restrained, suppressed or eliminated. Those petitioner is able to name are set forth in response to paragraph 1 above. In addition thereto are the following:

Peerless Enterprises, Inc. Theatres at Newport, Morristown, and Harriman, Tennessee. Was unable to get sufficient product to operate successfully and was forced to close down.

Ray Smith, Murfreesboro, Tennessee. Was prevented from opening competing theatre because of inability to get product from any of defendant distributors.

9. The "other exhibitors" referred to in paragraph 52 are the same as those set forth under 5(d) above.

Petitioner reserves the right to serve upon the defendants such other and further particulars, with respect to the

matters hereinbefore alleged, as may subsequently come within its knowledge.

Horace Frierson, Jr., United States Attorney.

Thurman Arnold, Assistant Attorney General; Robert E. Sher, Special Assistant to the Attorney General; Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 462] In the United States District Court

[Title omitted]

Order on Motions of Crescent Amusement Co., et al.—August 16, 1940

This case came on to be heard before the Hon. Elmer D. Davies, District Judge, on the 15th day of August, 1940, for hearing upon motion of the Crescent Amusement Company and other defendants to dispose of their motion filed on June 11, 1940, and also to dispose of their supplemental motion filed on this date. Upon consideration of which and after argument of counsel, the Court is of the opinion that Motion No. 1, filed on June 11, 1940, is well taken and accordingly it is ordered by the Court that as to such matters stated in the plaintiff's bill of particulars heretofore filed, that the plaintiff has no knowledge or information or incomplete knowledge or information, plaintiff is ordered to furnish the moving defendants whatever knowledge or information it may hereafter obtain or may have obtained since the filing of its bill of particulars, within thirty days after it has obtained such knowledge or information, and, in any event, not later than thirty days before trial.

[fols. 463-471] The second motion of the defendants filed on June 11, 1940, is hereby overruled and disallowed as is also the motion filed on this date.

Elmer D. Davies, Judge.

O. K. for entry: O. W. Hughes, Assistant U. S. District Attorney; McConnico, Armistead, Waller & Davis, Attorneys for Crescent Amusement Company, et al.

[fol. 472] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SECOND ADDITIONAL BILL OF PARTICULARS—Filed June 6, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars and petitioner's Additional Bill of Particulars filed herein on May —, 1941, as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: June, 1936. Place: Greeneville, Tennessee. Theatre: Palace. Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc. Defendant Exhibitor: Crescent Amusement Company. Distress Methods and Manner Employed: Threat of opening competing theatre in town and running independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

[fol. 473] Time: September, 1936.

Place: Maryville, Tennessee.

Theatre: Park.

Independent Exhibitor: Ausmus and Parrott Amusement Company, Inc.

Defendant Exhibitor: Crescent Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatre in town and running independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

Time: June, 1936.

Place: Greenville, Tennessee.

Theatre: Princess.

Independent Exhibitors: Ausmus and Parrott Amusement Company, Inc., and Parrott and Hendren Amusement Co., Inc.

Defendant Exhibitor: Crescent Amusement Company.

Distress Methods and Manner Employed: Threat of opening competing theatres in town and running independent exhibitors out of business. Independent exhibitors had trouble getting pictures and were forced to sell.

Time: August, 1936.

Place: LaFollette, Tennessee.

Theatre: Cherokee.

Independent Exhibitor: W. H. Parrott.

Defendant Exhibitors: Crescent Amusement Company, Rockwood Amusements, Inc., and Cherokee Amusements, Inc.

Distress Methods and Manner Employed: Independent exhibitor forced to sell 50 per cent interest in his theatre under threat that Crescent Amusement Company, Rockwood Amusements, Inc. or Cherokee Amusements, Inc. would build a competing theatre in the town where independent exhibitor was operating and run independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

With respect to the acquisition of certain theatres belonging to Hendren and Parrott Amusement Company by defendant exhibitors, referred to on page 5 of petitioner's original Bill of Particulars, petitioner amends the statement of the acquisition of said theatres as follows:

Time: August, 1936.

Independent Exhibitor: Parrott and Hendren Amusement Co., Inc.

Theatres: Capitol and Lyric.

Place: Erwin, Tennessee.

Theatres: Gay and Enid

Place: Sweetwater, Tennessee.

[fol. 474] Theatre: Grand.

Place: Lenoir City, Tennessee.

Theatres: Capitol and Novelty.

Place: LaFollette, Tennessee.

Defendant Exhibitors: Crescent Amusement Company, Rockwood Amusements, Inc., and Cherokee Amusements, Inc.

Distress Methods and Manner Employed: Independent exhibitor forced to sell 50 per cent interest in all its theatres under threat that Crescent Amusement Company, Rockwood Amusements, Inc., or Cherokee Amusements, Inc., would build competing theatres in every town where independent exhibitor operates and run independent exhibitor out of business. Independent exhibitor had trouble getting pictures and was forced to sell.

2(e). The "other towns" referred to in paragraph 45 of the complaint, in addition to those mentioned in paragraph 2(e) of petitioner's Additional Bill of Particulars, shall include:

Lexington, Tennessee

The term "Crescent towns" appearing in paragraph 45 includes the towns named in the complaint and the towns appearing on page 6 under paragraph 2(e) of petitioner's Additional Bill of Particulars, and also the following:

Lewisburg, Tennessee
Shelbyville, Tennessee

5(d). The term "said towns" in paragraph 48 of the complaint includes all Crescent towns named in the complaint, the Crescent towns named in answering paragraph 2(e) of petitioner's Additional Bill of Particulars filed herein, and the Crescent towns named above in answering paragraph 2(e) of this Additional Bill of Particulars, and any other towns in which defendant exhibitors have theatres, (with the exception of Nashville, Tennessee) and in addition the towns indicated below not otherwise included.

In addition to the "other exhibitors" referred to in paragraph 48(a) of the complaint and the "competing theatres" referred to in paragraph 48(b) of the complaint, [fol. 475] already set forth in petitioner's original Bill of Particulars and in petitioner's Additional Bill of Particulars, petitioner lists the following:

Ausmus and Parrott Amusement Company, Inc., Greeneville and Maryville, Tennessee.

W. H. Parrott, LaFollette, Tennessee.

Pagrott and Hendren Amusement Co., Inc., Erwin, Lenoir City, Sweetwater and Greeneville, Tennessee.

O. W. Hughes, Assistant United States Attorney.
Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 476] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

ADDITIONAL BILL OF PARTICULARS—Filed June 12, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940. The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: 1935.
Place: Clarksville, Tennessee.
Theatre: Lillian.
Independent Exhibitor: Goldberg Amusement Co.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Price cutting, giving away prizes. Independent exhibitor realized inability to compete with chain buying power and decided to sell.

Time: 1938.
Place: Columbia, Tennessee.
Theatre: Later the Lyric.

Independent Exhibitor: Bradley & Pigg.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Unknown.

[fol. 477] Time: 1939.
Place: Tompkinsville, Kentucky.
Theatre: Uptown.
Independent Exhibitor: Ira B. Dyer and B. F. Hite.
Defendant Exhibitor: Midstate Theatres, Inc.; affiliated with Cherokee Amusement, Inc. and Rockwood Amusements, Inc. through stock ownership.
Distress Methods and Manner Employed: Threat of driving independent exhibitor out of business.

Time: 1939 or 1940.
Place: Tompkinsville, Kentucky.
Theatre: Name Unknown.
Independant Exhibitor: E. J. Sparks.
Defendant Exhibitor: Midstate Theatres, Inc., affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc. through stock ownership.
Distress Methods and Manner Employed: Unknown.

Time: 1936.
Place: Paris, Tennessee.
Theatre: Gem.
Independent Exhibitor: C. G. Lawing.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1940.
Place: Paris, Tennessee.
Theatre: Princess.
Independent Exhibitor: B. F. Diggs.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Gadsden, Alabama.
Theatre: Gadsden.
Independent Exhibitor: Jack Crawford.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936 and 1937.
Place: Huntsville, Alabama.

Theatre: Elks.
Independent Exhibitor: M. B. Esserman.
Defendant Exhibitor: Lyric Amusement Company, Inc.
Distress Methods and Manner Employed: Independent exhibitor was unable to obtain sufficient product to compete against chain and was forced out of business.

Time: 1936.
Place: Manchester, Tennessee.
Theatre: Lyric.
Independent Exhibitor: Dr. A. A. Womack.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Rockwood, Tennessee.
Theatre: Lyric.
Independent Exhibitor: Walter Howard.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

[fol. 478] Time: 1936.
Place: Tracy City, Tennessee.
Theatre: Dixie.
Independent Exhibitor: Sam Werner, Sr.
Defendant Exhibitor: Rockwood Amusements, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Theatre: Madlyn.
Place: Lenoir City, Tennessee.
Independent Exhibitor: Deaton Theatre Corporation.
Defendant Exhibitor: Cherokee Amusements, Inc.
Distress Methods and Manner Employed: Independent exhibitor was unable to secure sufficient product to compete with chain and was forced to sell out.

Time: 1938
Place: Crossville, Tennessee.
Theatre: Palace.
Independent Exhibitor: William Garrison.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Crossville, Tennessee.

Theatre: Mecca.
Independent Exhibitor: William Garrison, Hugo Gernt, and Arthur Gernt.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Dayton, Tennessee.
Theatre: Dayton.
Independent Exhibitor: E. M. Williamson.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Franklin, Tennessee.
Theatre: Franklin.
Independent Exhibitor: Mrs. Cynthia Fleming.
Defendant Exhibitor: Cumberland Amusement Company.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Trenton, Tennessee.
Theatre: Strand.
Independent Exhibitor: C. P. Washman.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Marked Tree, Arkansas.
Theatre: Star.
Independent Exhibitor: Mrs. Harry Leavitt.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1935.
Place: Cleveland, Tennessee.
Theatre: Bohemia and another theatre, name unknown.
Independent Exhibitor: Otis G. Renner and Ruble B. Page.
Defendant Exhibitor: Crescent Amusement Company.
Distress Methods and Manner Employed: Price cutting; inability to secure sufficient product and were forced to sell.

[fol. 479] Time: 1936.
Place: Lepanto, Arkansas.
Theatre: Rialto.
Independent Exhibitor: Paul and M. D. Shafer.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Durant, Mississippi.
Theatre: Dixie.
Independent Exhibitor: Odam Brothers.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Louisville, Mississippi.
Theatre: Strand.
Independent Exhibitor: Mr. and Mrs. J. A. West.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Philadelphia, Mississippi.
Theatre: Strand.
Independent Exhibitor: Mr. and Mrs. J. A. West.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Kosciusko, Mississippi.
Theatre: Amuse-U.
Independent Exhibitor: Mr. Maher.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1937.
Place: Kosciusko, Mississippi.
Theatre: Strand.
Independent Exhibitor: B. Carey.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

Time: 1936.
Place: Ripley, Tennessee.
Theatre: Dixie.
Independent Exhibitor: Bill Henderson.
Defendant Exhibitor: Strand Enterprises, Inc.
Distress Methods Employed: Unknown.

With respect to the acquisition by the defendant exhibitors of the Cherokee Theatre, Inc. at Copper Hill, Tennessee in June 1939, referred to on page 5 of petitioner's original Bill of Particulars, this theatre was acquired by the Newport Amusement Company, which is affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc., through stock ownership.

[fol. 480] With respect to Newport Amusement Company, mentioned on page 2 of petitioner's original Bill of Particulars, this company is affiliated with Cherokee Amusements, Inc. and Rockwood Amusements, Inc. through stock ownership.

With respect to the acquisition by defendant exhibitors of the Palace Theatre at Rogersville, Tennessee in 1938, referred to on page 2 of petitioner's original Bill of Particulars, this theatre was acquired by Cumberland Amusement Company and later sold by Cumberland Amusement Company to Rockwood Amusements, Inc.

With respect to the acquisition of the theatre at Oneida, Tennessee, as shown on page 3 of petitioner's original Bill of Particulars, the independent exhibitors of this theatre were Ed Zumstein and H. F. Cooper.

With respect to the acquisition by defendant exhibitors of the Roxy Theatre at Union City, Tennessee in June 1939, referred to on page 3 of petitioner's original Bill of Particulars, this theatre was acquired by Crescent Amusement Company.

With respect to the acquisition by defendant exhibitors of the Roxy Theatre at Earlington, Kentucky in August 1939, referred to on page 3 of petitioner's original Bill of Particulars, this theatre was acquired by Crescent Amusement Company.

2 (e) The "other towns" referred to in paragraph 45 of the complaint are:

Livingston, Tennessee.
Dresden, Tennessee.
Sevierville, Tennessee.
Jefferson City, Tennessee.
Woodbury, Tennessee.
Mt. Pleasant, Tennessee.
Portland, Tennessee.
Mountain City, Tennessee.

Russellville, Kentucky.
Cave City, Kentucky.
Scottsville, Kentucky.
Burkesville, Kentucky.
Lebanon, Kentucky.
Bardstown, Kentucky.
Glasgow, Kentucky.

[fol. 481] The term "Crescent towns" appearing in paragraph 45 includes the towns named in the complaint and also the following:

Gallatin, Tennessee.
Harriman, Tennessee.
Newport, Tennessee.
McKenzie, Tennessee.
Copperhill, Tennessee.
Lawrenceburg, Tennessee.
Lake City, also known as Coal Creek, Tennessee.
Covington, Tennessee.
Greenfield, Tennessee.
Martin, Tennessee.
Newbern, Tennessee.
Halls, Tennessee.
Madison, Tennessee.
Central City, Kentucky.
Franklin, Kentucky.
Hickman, Kentucky.
Providence, Kentucky.
Greenville, Kentucky.
Tompkinsville, Kentucky.
Madisonville, Kentucky.
Spruce Pine, North Carolina.
Philadelphia, Mississippi.
Itta Bena, Mississippi.

5 (d) The term "said towns" in paragraph 48 of the complaint includes all Crescent towns named in the complaint, the Crescent towns named above in answering 2 (e), and any other towns in which defendant exhibitors have theatres, (with the exception of Nashville, Tennessee) and in addition the towns indicated below not otherwise included.

In addition to the "other exhibitors" referred to in para-

paragraph 48 (b) already set forth in petitioner's original Bill of Particulars, petitioner lists the following:

M. B. Esserman	Hopkinsville, Kentucky
Huntsville, Alabama	F. L. May
Jack Crawford	Hopkinsville, Kentucky
Gadsden, Alabama	C. P. Taylor
Dixie, Theatre	Hopkinsville, Kentucky
Manager, H. T. Bailey, Jr.	Walter Beymer
Gadsden, Alabama	Providence, Kentucky
Ed Zumstein	John N. Allison
Oneida, Tennessee	Guthrie, Kentucky
[fol. 482] H. F. Cooper	Denton Theatre Corporation
Oneida, Tennessee	Lenoir City, Tennessee
Sam Key	James R. Wilson
Lake City, Tennessee	McMinnville, Tennessee
Y. Douglas Moore	Otis G. Renner
McKenzie, Tennessee	Cleveland, Tennessee
J. W. Baird	Ruble B. Page
Newport, Tennessee	Cleveland, Tennessee
Cherokee Theatres, Inc.	Goldberg Amusement Co.
Copperhill, Tennessee	Clarksville, Tennessee
Manchester, Tennessee	W. S. Moore
Walter Howard	Portland, Tennessee
Rockwood, Tennessee	W. O. Taylor
Sam Werner, Sr.	Dresden, Tennessee
Tracy City, Tennessee	C. G. Lawing
William Garrison	Paris, Tennessee
Crossville, Tennessee	B. F. Diggs
Hugo Gernt	Paris, Tennessee
Crossville, Tennessee	Dr. A. A. Womack
Arthur Gernt	Ira B. Dyer
Crossville, Tennessee	Tompkinsville, Kentucky
[fol. 483] E. M. Williamson	B. F. Hire
Dayton, Tennessee	Tompkinsville, Kentucky
Mrs. Cynthia Fleming	Rhulander Estate Theatre
Franklin, Tennessee	Lawrenceburg, Kentucky
C. P. Washman	Joe Wiley
Trenton, Tennessee	Hickman, Kentucky
Bill Henderson	John D. Henry
Ripley, Tennessee	Hickman, Kentucky
F. M. Pittman	George Long
Central City, Kentucky	Hickman, Kentucky
V. E. Anderson	Mrs. Harry Leavitt

Marked Tree, Arkansas
Paul Shafer
Lepanto, Arkansas
M. D. Shafer
Lepanto, Arkansas
Odam Brothers
Durant, Mississippi
Mr. & Mrs. J. A. West
Louisville, Mississippi

[fol. 484] Mr. and Mrs.
J. A. West
Philadelphia, Mississippi
Mr. Maher
Kosciusko, Mississippi
B. Carey
Kosciusko, Mississippi
Ray Smith
Woodbury, Tennessee

6. In addition to the theatre operators whose competition was restrained, suppressed or eliminated, already referred to in petitioner's original Bill of Particulars, are included all the theatre operators listed in this Additional Bill of Particulars as answering paragraph 1 and paragraph 5(d) and the following:

James R. Wilson, McMinnville, Tennessee: is prevented from securing sufficient product to continue in business.

Ruble B. Page Theatres at Cleveland, Tennessee: was unable to secure sufficient product and forced out of business.

Joe Wiley, Hickman, Kentucky: threat of preventing independent from procuring pictures; independent abandoned construction of theatre.

Dixie Theatre, H. T. Bailey, Jr., Manager, Gadsden, Alabama: independent exhibitor unable to obtain satisfactory product and is having difficult time continuing in business.

Butler P. A. Hine and Hubert Mitchell, Decatur, Alabama: planned new theatre at Decatur; forced to abandon project when Crescent commenced building new theatre at identical location.

O. W. Hughes, Assistant United States Attorney.
Allen A. Dohey, Special Assistant to the Attorney General.

[fol. 485] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

THIRD ADDITIONAL BILL OF PARTICULARS—Filed July 3, 1941

The United States of America, petitioner herein, hereby files the following Additional Bill of Particulars in response

to the motions of the defendants, Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum, R. E. Baulch, and Kermit C. Stengel, in accordance with the order of the Court entered February 23, 1940.

With reference to the particulars named in this Additional Bill of Particulars, petitioner did not learn of these instances until after the thirty days mentioned in the Order of the Court entered February 23, 1940, had expired. With particular reference to the instance appearing in paragraph 1 below and relating to C. G. Lawing, independent at Brownsville, Tennessee, petitioner first learned of this situation on June 16, 1941 and, on June 23, 1941, wrote counsel for defendant exhibitors advising them of said situation. With reference to the town of Middlesboro, Kentucky, men- [fol. 486] tioned in paragraph 2 (e) below, petitioner first learned of this situation on June 20, 1941. With reference to the instance appearing in paragraph 5 (d) below, and paragraph 6 below, relating to S. B. Ford, independent at Lexington, Mississippi, petitioner first learned of this situation on June 22, 1941.

The subheadings listed below, under which said particulars are furnished, are the same subheadings as are set forth in said motions and in the order.

1. In addition to the theatres set forth in petitioner's original Bill of Particulars, petitioner's Additional Bill of Particulars filed herein on May 28, 1941, and petitioner's Second Additional Bill of Particulars filed herein on June 6, 1941, as theatres which defendant exhibitors have taken over or kept closed during the past five years, petitioner lists the following:

Time: 1935 and 1936.
Place: Brownsville, Tennessee.
Theatre: Southland.
Independent Exhibitor: C. G. Lawing.
Defendant Exhibitor: Crescent Amusement Co.
Distress Methods Employed: Kept independent from obtaining sufficient product to continue in business and independent was forced to close.

2 (e). The "other towns" referred to in paragraph 45 of the complaint, in addition to those mentioned in paragraph 2

(e) of petitioner's Additional Bill of Particulars and petitioner's Second Additional Bill of Particulars, shall include:

Middlesboro, Kentucky.

5 (d). In addition to the list of "other exhibitors" referred to in paragraph 48 (a) and of "competing theatres" referred to in paragraph 48 (b), appearing in petitioner's original Bill of Particulars, petitioner's Additional Bill of Particulars, and petitioner's Second Additional Bill of [fols. 487-490] Particulars, petitioner adds the following:

S. B. Ford, Lexington, Mississippi.

6. In addition to the list of theatre operators whose competition was restrained, suppressed, or eliminated, appearing in petitioner's original Bill of Particulars and petitioner's Additional Bill of Particulars, petitioner adds the following:

S. B. Ford, Independent operator of the Star Theatre at Lexington, Mississippi. Competition was restrained on account of not being able to get sufficient product to operate successfully.

O. W. Hughes, Assistant United States Attorney,
Allen A. Dobey, Special Assistant to the Attorney General.

[fol. 491] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

ANSWER OF THE CRESCENT AMUSEMENT COMPANY ET AL. TO SUPPLEMENT TO COMPLAINT—Filed July 31, 1941

The defendants herein, The Crescent Amusement Company, Lyric Amusement Company, Inc., Nu-Strand Corporation, Cumberland Amusement Company, Strand Enterprises, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, having united

in this answer for the convenience of the Court, for answer to the supplement to the complaint filed July 24, 1941, say:

First Defense

1. Defendants refer to and adopt their answer to the original complaint as their answer to the supplement to complaint as fully as if same were copied herein.

Second Defense

1. On November 14, 1940, plaintiff herein, United States of America, filed an amended and supplemental complaint in the District Court of the United States for the Southern District of New York in the case entitled "United States of America, Plaintiff v. Paramount Pictures, Inc., et al., Defendants," Civil Action No. 87-273, in which action each of the distributors referred to herein as "defendant distributors" was a party defendant and in said amended and supplemental complaint made the following allegation, among others:

> [fol. 492] "178. Each defendant distributor, with knowing all the matters and things hereinbefore alleged, for many years last past, has contracted with various theatre circuits throughout the United States, including the affiliated circuits hereinbefore mentioned, to restrain and, pursuant to such contracts, has in fact unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures among the several States of the United States, in violation of Section 1 of the Sherman Act, by entering into licensing agreements with said circuits of theatres which contain provisions calculated to impose on independent exhibitors in competition with such circuit theatres, one or more of the discriminatory restrictions referred to in the lettered subparagraphs of paragraph 149, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants."

2. Paragraph 149 in said amended and supplemental complaint, referred to in paragraph 178, above quoted, referred to (a) Runs, (b) Delivering prints, (c) Clearance, (d) Minimum admission prices, (e) Prohibition of double features on subsequent runs, (f) Selectivity of deals, (g) Designa-

tion of play dates, (h) Forcing of short subjects, news reels, trailers, serials, reissues, westerns and foreigns, (i) Film rentals, (j) Advertising allowances, (k) Score charges, (l) Optional contracts, (m) Contract modifications, (n) Overage and underage, (o) Moveovers, and (p) Overbuying, as means of discrimination most frequently employed by the distributors. A printed copy of said amended and supplemental complaint is filed herewith as Exhibit A to this answer, and reference is made to same for its allegations and prayers in detail.

3. Said amended and supplemental complaint contains prayers, among others, that each contract, combination and conspiracy in restraint of trade and commerce be declared illegal and violative of the Sherman Act, and that the defendants be enjoined and restrained from continuing to carry out the said restraints of interstate trade and commerce. Reference is particularly made to paragraphs (2) and (3) of the "Prayer."

4. Following the filing of said amended and supplemental complaint on November 15, 1940, answers were filed by the corporations who were defendants. True copies of the [fol. 493] answers of such of said defendants as were also defendants in this cause but were subsequently dismissed as defendants are filed herewith collectively as Exhibit B to this answer, and reference is made to them for their contents in full.

5. On November 20, 1940, a consent decree was entered in said above mentioned cause in the District Court of the United States for the Southern District of New York, and a true copy of said consent decree is filed herewith as Exhibit C to this answer, and reference is made to same for its contents in full.

6. Said consent decree contained a section numbered XV as follows:

> "The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof."

Section VIII relates to arbitration of controversies as to clearance, and Section XVII relates to licensing of pictures by distributors to their affiliated theatres.

7. Prior to June 6, 1940, defendants herein negotiated so-called franchises with certain of the distributor defendants who have been dismissed as defendants herein, and although the legality of franchises of this character was an issue in said case of United States of America v. Paramount Pictures, Inc., et al., in which said consent decree was entered, there was no adjudication that same were illegal, but on the contrary they were expressly exempted from the provisions of the consent decree. Certain of said franchises negotiated by defendants, or some of them, are now in effect, and plaintiff is seeking in this cause an adjudication that same are illegal *per se*, and is seeking an injunction to prevent them from being performed because of their said alleged illegality.

8. Having brought this suit in equity in this Court, sitting as a Court of Equity, plaintiff is bound by equitable [fol. 494] principles and is precluded from taking the inconsistent position that said franchises negotiated prior to June 6, 1940, are illegal.

9. The distributors who are parties to the franchises and other contracts as to which plaintiff seeks an adjudication of illegality are indispensable parties, and since they have been dismissed as defendants, no such relief can be granted.

Wherefore defendants demand judgment dismissing the Supplement to the Complaint as to them, with their costs.

Geo. H. Armistead, Jr., William Waller, Attorneys,
American Trust Building, Nashville, Tennessee.

Of Counsel:

Armistead, Waller, Davis & Lansden, American Trust Building, Nashville, Tennessee.

[fol. 495] EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION; Loew's, Inc[illegible]ated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.; Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.; United Artists Corporation, Defendants

Amended and Supplemental Complaint

Leave of Court having been first obtained, the United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, hereby amends and supplements the petition filed herein on July 20, 1938, and the bills of particulars filed pursuant thereto, by substituting therefor this amended and supplemental complaint against the following defendants:

Paramount Pictures Inc., Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.; [fols. 496-504] Universal Corporation, Universal Pictures

Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.; United Artists Corporation,—defendant corporations, and for its complaint plaintiff alleges, upon information and belief, as follows:

. . . . . .

[fol. 505] IV. *Growth of the Defendants*

A. Paramount [1]

18. Famous Players-Lasky Corporation (now known as Paramount Pictures Inc.) was organized by Mr. Adolph Zukor (Chairman of the Board of Paramount Pictures Inc.) and Mr. Jesse L. Lasky and incorporated on July 19, 1916. The corporate name was changed to Paramount Famous Lasky Corporation on April 1, 1927 and on April 24, 1930 the name was changed to Paramount Publix Corporation.

19. In 1933 Paramount Publix Corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York. In June, 1935, it was reorganized under Section 77B of the Bankruptcy Act under the name of Paramount Pictures Inc.

20. Twelve producing companies were merged with Famous Players-Lasky Corporation in 1917. At the same time the company integrated production and distribution by acquiring a national distribution system through merger with Artcraft Pictures Corporation and Paramount Pictures Corporation. Thereafter the company from time to time acquired interests in other producing and distributing companies.

21. At the present time pictures are produced by the parent company, Paramount Pictures Inc., which is one of the principal producing companies in the industry. It maintains production facilities in Hollywood, California.

[1] The term "Paramount," as hereinafter used, includes all subsidiaries of the parent corporation, Paramount Pictures Inc. The term "subsidiaries" as used throughout this complaint includes all corporations in which the parent owns, directly or indirectly, a percentage of the voting stock sufficiently large to permit the exercise of substantial voting control, even though such percentage is less than 51% of the total voting stock.

and in New York and Long Island, New York. The follow- [fol. 506] ing chart indicates Paramount's relative position in the industry with respect to pictures produced for the seasons mentioned.

Season	Features Produced in Industry	Features Produced by Paramount
1930-31	510	58
1931-32	490	56
1932-33	510	51
1933-34	480	55
1934-35	520	44
1935-36	517	50
1936-37	535	41
1937-38	450	40
1938-39	526	58

22. Paramount Pictures Inc. also produces approximately 45 shorts and 104 news reels each season.

23. Paramount pictures are distributed directly by it and also by its wholly owned subsidiary Paramount Film Distributing Corporation, through exchanges in 33 key cities. During the 1936-37 season Paramount distributed 59 features, 18 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

24. In 1919 Paramount entered upon a program of theatre acquisition. In that year it acquired a stock interest in Southern Enterprises, Inc., which operated approximately 135 theatres in the South. In 1920 a stock interest was acquired in New England Theatres, Inc., which operated approximately 50 theatres in the New England states. About 1926, Paramount acquired a stock interest in the Butterfield Theatre Circuit, which operated approximately 70 theatres in Michigan. During the same year a stock interest was acquired in Balaban and Katz Corporation, which operated approximately 50 theatres in Illinois. Theatres were also subsequently acquired in the West and Middle West through the acquisition of various theatres and of stock interests in various corporations operating theatre circuits.

25. The number and location of theatres now operated by Paramount are approximately as follows:

[fol. 507] (a) First-run Metropolitan Theatres:

City	No. of Theatres	City	No. of Theatres
Atlanta, Ga.	4	Memphis, Tenn.	2
Boston, Mass.	4	Minneapolis, Minn.	6
Brooklyn, N. Y.	1	Newark, N. J.	4
Charlotte, N. C.	3	New Haven, Conn.	1
Chicago, Ill.	6	New Orleans, La.	3
Dallas, Tex.	6	New York, N. Y.	1
Des Moines, Ia.	4	Omaha, Neb.	3
Detroit, Mich.	5	Salt Lake City, Utah	6
Houston, Texas	3	St. Paul, Minn.	4
		Total	63

(b) Other theatres operated by Paramount are approximately as follows:

State	No. of Theatres	State	No. of Theatres
Alabama	33	Nebraska	11
Arizona	8	New Hampshire	10
Arkansas	47	New Jersey	2
California	4	New Mexico	7
Colorado	9	New York	24
Connecticut	5	North Carolina	66
Florida	109	North Dakota	10
Georgia	34	Ohio	16
Idaho	9	Oklahoma	6
Illinois	116	Pennsylvania	72
Indiana	8	Rhode Island	3
Iowa	60	South Carolina	23
Kentucky	11	South Dakota	20
Louisiana	17	Tennessee	26
Maine	39	Texas	199
Maryland	1	Utah	15
Massachusetts	78	Vermont	8
Michigan	11	Virginia	17
Minnesota	32	West Virginia	3
Mississippi	35	Wisconsin	5
Missouri	1		
		Total	1,210

26. The parent corporation, Paramount Pictures, Inc. has gross assets of approximately $90,000,000. Its consoli-

dated gross income was in excess of $100,000,000 for the fiscal year ended in 1939.

B. Loew's [1]

27. In about the year 1905, the late Marcus Loew (who, before his death in 1927, was president of Loew's, Incorporated), in association with others, began to operate some [fol. 508] so-called "penny arcades" in New York City and one in Cincinnati. Shortly thereafter, certain of these penny arcades were remodeled so as to permit, in part of the premises, the exhibition of single reel motion pictures, for which an admission price of 5¢ was charged. In 1907 the enterprise acquired its first theatre. It was located in Brooklyn, New York, and was operated with vaudeville and single reel pictures.

28. The motion picture subjects were bought by Mr. Loew from various picture producers and exhibited in the Loew theatres; the custom was to buy one print of each subject. By the year 1910, Mr. Loew and his associates owned stock interests in a number of corporations operating store shows and theatres in New York and elsewhere, all of them showing vaudeville and short-subject pictures.

29. In 1910, Mr. Loew and his associates organized Loew's Consolidated Enterprises, which in 1911, was succeeded by Loew's Theatrical Enterprises.

30. Between 1911 and 1919, Loew's Theatrical Enterprises, through subsidiary corporations, extended its activities in the operation of theatres devoted to motion pictures or a combination of vaudeville and motion pictures. Additional theatres were acquired in New York City and in certain cities other than New York. By 1919, Loew's Theatrical Enterprises had financial interests in approximately 56 theatres.

31. In October 1919, Loew's Incorporated, was organized, and acquired all of the outstanding stock of Loew's Theatrical Enterprises. The extent of the theatre business of Loew's, Incorporated, has increased gradually since 1919.

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[1] The term "Loew's", as hereinafter used, includes all subsidiaries of the parent corporation, Loew's Incorporated.

32. The number and location of the theatres now operated by Loew's is approximately as follows:

[fol. 509] (a) Metropolitan First-run Theatres:

City	No. of Theatres	City	No. of Theatres
Atlanta, Ga.	1	Memphis, Tenn.	1
Baltimore, Md.	1	Newark, N. J.	1
Boston, Mass.	2	New Haven, Conn.	2
Brooklyn, N. Y.	1	New Orleans, La.	1
Cleveland, Ohio	2	New York, N. Y.	2
Denver, Colo.	1	Pittsburgh, Pa.	1
Houston, Texas	1	St. Louis, Mo.	1
Indianapolis, Ind.	1	San Francisco, Calif.	1
Kansas City, Mo.	1	Washington, D. C.	3
		Total	24

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
Connecticut	8	New Jersey	2
Delaware	1	Ohio	5
District of Columbia	1	Pennsylvania	5
Indiana	2	Rhode Island	1
Kentucky	1	Tennessee	1
Maryland	2	Virginia	2
Massachusetts	3		
New York	64	Total	98

33. In 1920, Loew's, Incorporated, entered the field of production and distribution of motion pictures by acquiring the outstanding stock of Metro Pictures Corporation. In 1924, Metro Pictures Corporation merged with Goldwyn Pictures Corporation under the name of Metro-Goldwyn Pictures Corporation. The result of this merger was that Loew's, Incorporated, became the owner of all of the common stock of Metro-Goldwyn Pictures Corporation. At about the time of this merger, Louis B. Mayer Pictures, Inc., contracted to supervise the production of all pictures produced by the merged company, and turned over to Metro-Goldwyn Pictures Corporation certain of the assets of Louis B. Mayer Pictures, Inc. The business of Metro-Goldwyn-Pictures Corporation was subsequently assumed by Metro-

Goldwyn-Mayer Corporation. On December 31, 1937, Metro-Goldwyn-Mayer Corporation ceased to do business and the production activities were taken over by Loew's, Incorporated.

[fol. 510] 34. The following tabulation indicates the feature pictures produced by Loew's as compared with the total number of features produced, for the nine year period ending with the 1938-39 season:

Season	*Features Produced in Industry*	*Features Produced by Loew's*
1930-31	510	43
1931-32	490	40
1932-33	510	37
1933-34	480	44
1934-35	520	42
1935-36	517	43
1936-37	535	40
1937-38	450	41
1938-39	526	51

35. For the eight year period ending with the 1937-38 season, Loew's produced an average of 36 short subjects per year.

36. Loew's product is distributed through exchanges maintained by it in 31 key cities. During the 1936-37 season Loew's distributed 50 features, 10 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

37. The parent corporation, Loew's, Incorporated, has gross assets of approximately $150,000,000. During the fiscal year ending in 1939, its gross income was in excess of $100,000,000.

C. Fox[1]

38. Twentieth Century-Fox Film Corporation was incorporated under the name of Fox Film Corporation on February 1, 1915. Fox Film Corporation was voluntarily

[1] The term "Fox," as hereinafter used, includes all subsidiaries of Twentieth Century-Fox Film Corporation and of National Theatres Corporation.

reorganized with the consent of its creditors, and security holders in the summer of 1933. In August 1935, Fox Film Corporation acquired all the assets of Twentieth Century Pictures, Inc., a producing and distributing company, and the name of the company was changed to Twentieth Century-Fox Film Corporation.

[fol. 511] 39. The following chart indicates the feature pictures produced by Fox as compared with the total number of features produced for the nine year period ending with the 1938-39 season:

Season	*Features Produced in Industry*	*Features Produced by Fox*
1930-31	510	48
1931-32	490	46
1932-33	510	41
1933-34	480	46
1934-35	520	40
1935-36	517	52
1936-37	535	52
1937-38	450	49
1938-39	526	56

40. Movietonews, Inc., a wholly owned Fox subsidiary, for the eight year period ending 1937-38, produced an average of 20 shorts and 104 news reels per year.

41. Fox product is distributed directly by Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Distributing Corporation and Twentieth Century-Fox Corporation of Texas, wholly owned subsidiaries, through exchanges in 31 key cities. During the 1936-37 season Fox distributed 65 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

42. In August 1925, Fox Film Corporation acquired approximately one-third of the common stock of West Coast Theatres, Inc., a company operating theatres in California and other western states; and, in March 1928, Fox Film Corporation purchased all the common stock of Wesco Corporation (now National Theatres Corporation), a holding company for theatre operating corporations.

43. In 1934, Wesco Corporation readjusted its capital structure by voluntary agreement among its creditors and

stockholders, pursuant to which The Chase National Bank of the City of New York acquired 58% of the stock of Wesco Corporation and Fox Film Corporation retained 42%. At about the same time the Chase Bank acquired a substantial stock interest in Fox Film Corporation and still owns a substantial interest in Twentieth Century-Fox [fol. 512] Film Corporation. The name of Wesco Corporation was thereafter changed to National Theatres Corporation and the Chase Bank still retains 58% of the stock of National Theatres Corporation. National Theatres Corporation operates theatres in the middle and far western parts of the United States through numerous subsidiary operating corporations.

44. In 1937, Twentieth Century-Fox Film Corporation acquired all the common stock of Roxy Theatre, Inc., which owns the Roxy Theatre, a large first-run theatre in New York City.

45. The location and number of theatres now operated by Fox is approximately as follows:

(a) Metropoltian first-run theatres:

City	*No. of Theatres*	*City*	*No. of Theatres*
Denver, Colo.	4	New York City	1
Detroit, Mich.	1	Portland, Ore.	4
Kansas City, Mo.	3	San Francisco, Calif.	4
Los Angeles, Calif.	5	Seattle, Wash.	5
Milwaukee, Wis.	3		
		Total	30

(b) Other theatres are located as follows:

State	*No. of Theatres*	*State*	*No. of Theatres*
Arizona	7	Montana	17
California	196	Nebraska	10
Colorado	32	New Mexico	6
Idaho	9	Oregon	9
Illinois	21	Utah	9
Iowa	6	Washington	23
Kansas	56	Wisconsin	50
Michigan	5	Wyoming	14
Missouri	45		
		Total	508

46. Twentieth Century-Fox Film Corporation has gross assets of approximately $60,000,000. During the fiscal year ended in 1939, its consolidated gross income was approximately $50,000,000.

[fol. 513]

D. Warner [1]

47. Warner Bros. Pictures, Inc., was incorporated in 1923 for the purpose of producing, distributing, and exhibiting motion pictures. At that time, it owned and operated a motion picture studio in Hollywood, but had no theatres.

48. The Warner Company became interested in experimental work in the development of talking pictures, and, in August 1926, the first public performance of talking pictures was presented in the Warner Theatre in New York City.

49. Warner is one of the principal producing companies in the industry and maintains production facilities at Burbank and Hollywood, California, and Brooklyn, New York. The number of features produced by it as compared with the total number of features produced for the nine year period ending with the 1938-39 season is indicated by the following tabulation:

Season	Features Produced in Industry	Features Produced by Warner
1930-31	510	69
1931-32	490	56
1932-33	510	53
1933-34	480	63
1934-35	520	51
1935-36	517	58
1936-37	535	58
1937-38	450	52
1938-39	526	54

50. During the eight year period ending 1937-38 Warner produced an average of 102 short subjects per year.

[1] The term "Warner", as hereinafter used, includes all subsidiaries of the parent corporation, Warner Bros. Pictures, Inc.

51. In 1925 Warner Pictures, Inc, acquired Vitagraph, Inc., which operated 34 exchanges in the principal cities of the United States and Canada, and two other affiliated companies which operated exchanges in foreign countries. Warner product is distributed through Vitagraph, Inc. During the 1936-37 season Vitagraph distributed 60 features, 2 more than it produced, and ordinarily distributes some features each season produced by others for release by it.

[fol. 514] 52. Warner Bros. Pictures, Inc., entered the exhibition field in December 1924, when it acquired a theatre in Youngstown, Ohio. In 1925, it acquired 13 additional theatres in various parts of the United States. In December 1928, the corporation acquired a majority of the stock of Stanley Company of America, which operated, directly or through subsidiaries, 182 theatres and had partial stock interests in theatre companies that owned or leased 51 theatres. The theatres of the Stanley Company of America were located in the Middle Atlantic States and the Distract of Columbia.

53. Subsequently, the company acquired interests in theatres in Missouri, Pennsylvania, Maryland, New Jersey, Ohio, Connecticut, New York, Illinois, Wisconsin, Virginia, and Kentucky.

54. The approximate number and locations of theatres now operated by Warner are as follows:

(a) Metropolitan first-run theatres:

City	No. of Theatres	City	No. of Theatres
Albany, N. Y.	2	Newark, N. J.	2
Baltimore, Md.	1	New Haven, Conn.	1
Brooklyn, N. Y.	1	New York, N. Y.	2
Charlotte, N. C.	1	Oklahoma City, Okla.	7
Cleveland, Ohio	2	Philadelphia, Pa.	8
Los Angeles, Calif.	2	Pittsburgh, Pa.	2
Memphis, Tenn.	1	Washington, D. C.	2
Milwaukee, Wis.	1		
		Total	35

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
California	10	New York	44
Connecticut	34	Ohio	56
Delaware	6	Oklahoma	7
District of Columbia	14	Oregon	2
Illinois	19	Pennsylvania	185
Indiana	3	Virginia	9
Kentucky	8	Washington	3
Maryland	7	West Virginia	11
Massachusetts	16	Wisconsin	18
New Jersey	90		
		Total	522

55. Warner Bros. Pictures, Inc. has gross assets of approximately $150,000,000. During the fiscal year ended 1939 its gross income exceeded $100,000,000.

[fol. 515]

E. RKO[1]

56. Radio-Keith-Orpheum Corporation was incorporated under the laws of the State of Maryland on October 25, 1928. Since its incorporation it has been primarily a holding company for subsidiaries engaged in the production, distribution, and exhibition of motion pictures. Shortly after its organization, Radio-Keith-Orpheum Corporation secured control of its principal exhibition and production companies, Keith-Albee-Orpheum Corporation and FBO Productions, Inc., respectively.

57. Organized on January 28, 1928, as a Delaware corporation, Keith-Albee-Orpheum Corporation acquired, in February of the same year, all of the outstanding stock of B. F. Keith Corporation and approximately 90% of the outstanding stock of Orpheum Circuit, Inc. Subsidiaries of B. F. Keith Corporation owned and operated in various cities in the eastern part of the United States a large number of theatres which, although originally devoted to the performance of vaudeville, were converted and used for the exhibition of motion pictures. Orpheum Circuit, Inc., di-

[1] The term "RKO", as hereinafter used, includes all subsidiaries of Radio-Keith-Orpheum Corporation and Keith-Albee-Orpheum Corporation.

rectly or through subsidiaries, operated theatres throughout the Midwest and Western parts of the United States.

58. In addition to Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., Radio-Keith-Orpheum Corporation obtained the controlling interest in numerous other companies engaged in the motion picture exhibition business, the most important being RKO Proctor Corporation and RKO Midwest Corporation. RKO Proctor Corporation operated the Proctor circuit of theatres located in the New York metropolitan district and in up-state New York. RKO Midwest Corporation controlled a group of theatres in Ohio and Michigan.

59. The number and location of theatres now operated by RKO is approximately as follows:

[fol. 516] (a) Metropolitan first-run theatres:

City	No. of Theatres	City	No. of Theatres
Albany, N. Y.	2	Minneapolis, Minn.	1
Boston, Mass.	2	Newark, N. J.	2
Brooklyn, N. Y.	2	New Orleans, La.	1
Chicago, Ill.	1	New York, N. Y.	1
Cincinnati, Ohio	6	Omaha, Neb.	1
Cleveland, Ohio	2	San Francisco, Calif.	1
Denver, Colo.	1	St. Paul, Minn.	2
Des Moines, Iowa	1	Washington, D. C.	1
Los Angeles, Calif.	2		
		Total	29

(b) Other theatres are located as follows:

State	No. of Theatres	State	No. of Theatres
California	1	New Jersey	14
Illinois	2	Ohio	13
Iowa	5	Rhode Island	2
Massachusetts	3	West Virginia	3
Michigan	7		
New York	53	Total	103

60. The name of FBO Productions, Inc., the principal producing company absorbed by Radio-Keith-Orpheum Corporation, was ultimately changed to RKO Radio Pic-

tures, Inc. RKO maintains production facilities in Hollywood and Culver City, California.

61. The number of features produced by RKO during the nine year period ending 1938-39 as compared with the total number of feature pictures produced during that period is indicated by the following chart:

Season	Features Produced in Industry	Features Produced by RKO
1930-31	510	32
1931-32	490	48
1932-33	510	45
1933-34	480	40
1934-35	520	40
1935-36	517	43
1936-37	535	39
1937-38	450	41
1938-39	526	49

62. In January 1931, Radio-Keith-Orpheum Corporation took over, through subsidiaries, the news reel and other production business and facilities of Pathe Exchange, Inc.

63. For the eight-year period ending 1937-38 RKO Radio Pictures, Inc. produced an average of 33 short subjects per [fol. 517] year and the Van Beuren Corporation, a wholly owned subsidiary, produced an average of 48 short subjects per year. During the same period Pathe News, Inc., a wholly owned subsidiary, produced an average of 10 short subjects and 104 news reels per year.

64. RKO product is distributed by RKO Radio Pictures, Inc. through its exchanges located in 32 cities. During the 1936-37 season RKO distributed 47 features, 8 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

65. On January 27, 1933, Radio-Keith-Orpheum Corporation went into an equity receivership and Irving Trust Company was appointed Receiver. On June 8, 1934, Radio-Keith-Orpheum Corporation filed a petition for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the Southern District of New York. Irving Trust Company was appointed Trustee in reorganization. A plan of reorganization was approved January 12, 1939, confirmed April 11, 1939, and such ap-

proval and confirmation were affirmed by the Circuit Court of Appeals for the Second Circuit on September 8, 1939.

66. The parent corporation has gross assets of approximately $70,000,000. During the fiscal year ended in 1939 its consolidated gross income was about $40,000,000.

F. *Columbia*[1]

67. Columbia Pictures Corporation was incorporated in the State of New York on January 10, 1924. Its organizers and, at that time, sole stockholders were Joe Brandt, Harry Cohn, and Jack Cohn. Commencing on February 4, 1925, with the acquisition of the assets of C. B. C. Film Sales Corporation, Columbia Pictures Corporation bought up exchanges throughout the country for the marketing of its product. By 1929, its distribution system was organized upon a national scale. In 1930, it secured exchanges for the foreign distribution of its film.

[fol. 518] 68. During 1928, Columbia acquired, through merger, Screen Shapshots, Inc., Hall Room Boys Photoplays, Inc., Starland Revue, Inc., all producers of short subjects, and in 1931 secured 50% and, in 1937, the remaining 50% of the capital stock of Screen Gems, Inc., also a producer of short subjects.

69. The following chart shows the number of features produced by Columbia, as compared with the total number of features produced during the nine-year period ending with the 1938-39 season:

Season	Features Produced in Industry	Features Produced by Columbia
1930-31	510	27
1931-32	490	31
1932-33	510	36
1933-34	480	44
1934-35	520	39
1935-36	517	36
1936-37	535	38
1937-38	450	39
1938-39	526	54

[1] The term "Columbia", as hereinafter used, includes all subsidiaries of the parent corporation, Columbia Pictures Corporation.

70. During the eight-year period ending 1937-38, Columbia Pictures Corporation produced an average of 39 short subjects and Screen Gems, Inc., produced an average of 22 short subjects per year.

71. Columbia product is distributed through its 32 exchanges located in key cities. During the 1936-37 season Columbia distributed 51 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

72. The parent corporation has gross assets of approximately $15,000,000. During the fiscal year ended in 1939 its gross income was about $20,000,000.

G. *Universal*[1]

73. Universal Pictures Corporation, formerly Universal Film Manufacturing Company, was incorporated in New York, in 1912, and with its subsidiaries, engaged in the production and distribution of motion pictures in the United States and throughout the world.

[fol. 519] 74. Universal Pictures Company, Inc., was formed on January 10, 1925, and at approximately the same time purchased the entire outstanding capital stock of Universal Pictures Corporation. From 1925 to 1936, Universal Pictures Corporation was the production branch of its parent company, Universal Pictures Company, Inc. During such period, motion pictures produced by Universal Pictures Corporation were distributed by Universal Film Exchanges, Inc. and Big U Film Exchange, Inc.

75. In April 1936, Universal Corporation was organized for the chief purpose of acquiring the controlling stock interest of Carl Laemmle and his associates in Universal Pictures Company, Inc., a producer, and Big U Film Exchange, a distributor of motion pictures.

76. The number of features produced by Universal, as compared with the total number of features produced dur-

[1] The term "Universal", as hereinafter used, includes all subsidiaries of the parent corporation, Universal Corporation.

ing the nine-year period ending 1938-39, is indicated by the following tabulation:

Season	Features Produced by Industry	Features Produced by Universal
1930-31	510	22
1931-32	490	32
1932-33	510	28
1933-34	480	38
1934-35	520	39
1935-36	517	27
1936-37	535	40
1937-38	450	45
1938-39	526	45

77. For the eight year period ending with the 1937-38 season, Universal produced an average of 111 short subjects and 104 news reels per year. During the 1936-37 season, Universal distributed 40 features, no more than it produced, but it ordinarily distributes each season some features produced by others for release by it.

78. In January 1926, Universal Pictures Corporation and its president, Carl Laemmle, secured a substantial stock interest in Universal Chain Theatres Corporation, which, through subsidiaries and affiliated companies, operated a [fol. 529] large number of theatres. In 1928, Universal Chain Theatres Corporation and its affiliates operated about 315 theatres in Canada, the District of Columbia, and 20 States of the United States, including the Griffith Amusement Company circuit of 40 theatres in Oklahoma and Texas, and the Schine chain of 90 theatres in New York and Ohio. A substantial number of its theatres were disposed of between 1929 and 1931. It went into receivership in 1933, and its remaining theatres were sold by the receiver.

79. The dissolution of Universal Pictures Corporation in December 1936, was accompanied by a transfer of its assets to Universal Pictures Company, Inc. Since January 1, 1937, Universal Pictures Company, Inc., has been engaged in the production of motion pictures which are distributed in the United States by Big U Film Exchange, Inc., and Universal Film Exchanges, Inc.

80. Universal Pictures Company, Inc., has gross assets of approximately $12,000,000. During the fiscal year ended in 1939, its gross income was about $20,000,000.

B. United Artists[1]

81. United Artists Corporation was organized in 1919, by a group of individuals who had achieved prominence in the production branch of the motion picture industry. The purpose of the corporation was to distribute the features produced by its organizers.

82. Most of the features distributed by United Artists Corporation have been first-class features, although as a general rule it does not release as many pictures per year as the other major companies.

83. The following tabulation indicates the number of United Artists releases as compared with the total number of features produced during the nine year period ending 1938-39:

[fol. 531]

Season	Features Produced in Industry	Features Released by United Artists
1930-31	510	13
1931-32	490	14
1932-33	510	16
1933-34	480	20
1934-35	520	19
1935-36	517	17
1936-37	535	19
1937-38	450	16
1938-39	526	18

84. United Artists now distributes pictures for the following producers among others: Samuel Goldwyn, Charles Chaplin, Mary Pickford, Alexander Korda, and London Film Productions, Ltd., Selznick International, Edward Small, Sol Lesser, Hal Roach, David Loew, Ernest Lubitsch, Walter Wanger, and Richard Rowland.

85. United Artists maintains exchanges in 26 cities.

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[1] The term "United Artists", as hereinafter used, refers to the defendant, United Artists Corporation.

86. The corporation is owned by five stockholders, Charles Chaplin, Samuel Goldwyn, Mary Pickford, the Estate of Douglas Fairbanks and Alexander Korda. It issues no public statement of gross assets or business done but for the fiscal year ended in 1939 its gross income exceeded $10,000,000.

I. *Joint Theatre Interests*

87. Each of the producer-exhibitor defendants is jointly interested financially in one or more theatres with one or more of the other producer-exhibitor defendants, through profit sharing arrangements with respect to particular theatres; through so-called pools where several theatres owned or controlled by two or more are operated as a unit; through direct or indirect ownership of stock in a single theatre operating corporation by two or more of such defendants; or through arrangements where one owns or leases a theatre and the other manages it. Such joint interests include all of the following combinations with respect to one or more theatres: Fox with Loew's, Fox with Paramount, Fox with RKO, Fox with Warner, Loew's with Paramount, Loew's with RKO, Loew's with Warner, Paramount with RKO, Paramount with Warner and RKO with Warner.

[fols. 522-561] 88. There are about 200 theatres in the United States in which such joint interests are held, including a substantial number of metropolitan first-run theatres.

89. In addition to the foregoing joint theatre interests of the producer-exhibitor defendants with each other there are numerous other joint theatre interests where executive employees, or managing agents of one producer-exhibitor defendant have direct or indirect stock interests in a theatre operating corporation in which another producer-exhibitor defendant also owns a direct or indirect stock interest.

[fol. 562] VIII. *Prayer*

Wherefore, plaintiff prays:

(1) That the court issue its preliminary injunction restraining the defendants herein, and each of them, from building, buying, leasing, or otherwise acquiring any additional theatres or any further interest, or interests, in

any additional theatres, either directly or indirectly, through the acquisition thereof by subsidiary or associated corporations or otherwise, until the final decree herein or until the further order of this court.

(2) That each of the contracts, combinations, and conspiracies in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

(3) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of the respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in the production, distribution, and exhibition of motion pictures described herein, and from entering into and carrying out, [fol. 563] directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

(4) That a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.

(5) That the integration of the production and exhibition branches of the industry by the producer-exhibitor defendants herein, and each of them, be declared to be unlawful as an instrumentality of monopoly and restraint upon interstate trade and commerce, and violative of the Sherman Anti-Trust Act.

(6) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Inc., Loew's Incorporated, and Radio-Keith-Orpheum Corporation, and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and in-

direct, either in theatres and theatre holdings or in production and distribution facilities and that they, and each of them, and their respective successors be permanently enjoined from acquiring, directly or indirectly, any other interests in the branch of the industry divested, or in any persons, firms, or corporations which are engaged or may engage in that branch of the industry; said divestiture to be accomplished and carried out upon such terms and conditions as the court may deem proper.

(7) That the defendants Paramount Pictures Inc., Twentieth Century-Fox Film Corporation, National Theatre Corporation, Warner Bros. Pictures, Inc., Warner Bros. [fols. 564-566] Circuit Management Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, R. K. O. Proctor Corporation and R. K. O. Midwest Corporation and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find have been used by one or more of them to unreasonably restrain trade and commerce in motion pictures in violation of Section 1 of the Sherman Act or to monopolize trade and commerce in motion pictures in violation of Section 2 of the Sherman Act.

(8) That the plaintiff have such other and further relief as the court may deem proper.

(9) That the plaintiff recover its costs herein.

United States of America; John T. Cahill, United States Attorney for the Southern District of New York.

Robert H. Jackson, Attorney General. Thurman Arnold, Assistant Attorney General. James V. Hayes, Robert L. Wright, Robert E. Sher, J. Stephen Doyle, Jr., John F. Clagett, James M. Malloy, Special Assistants to the Attorney General. J. Frank Cunningham, Seymour Simon, Special Attorneys.

[fol. 567] EXHIBIT "C" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

against

PARAMOUNT PICTURES, INC., et al., Defendants

CONSENT DECREE

[fol. 568] The United States of America having filed its Petition herein on July 20, 1938, and its Amended and Supplemental Complaint on November 14, 1940; the defendants: Paramount Pictures Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation[1] having appeared and severally filed their answers to such petition and to such Amended and Supplemental Complaint and having asserted the truth of their answers and their innocence of any viola-[fol. 569] tion of law; and no testimony having been taken, but each of the consenting defendants having consented to the entry of this decree without any findings of fact, upon condition that neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being (1) an admission or adjudication that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated or are or is violating any statute or law, or (2) evidence that such allegations, or any of them, are or is true, or

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[1] The above named defendants are referred to hereinafter as the consenting defendants.

that such defendants, or any one or more of them, have or has violated any statute or law, or (3) an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of any statute or law, and upon the further conditions hereinafter set forth; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof upon such conditions, and having moved the Court for the entry of this decree;

Therefore, it is ordered, adjudged and decreed as follows:

I

The Court has jurisdiction of the parties hereto; and for the purposes of this decree and of proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

The Petitioner not having offered any proof of its allegations that defendants have violated the antitrust laws, and defendants having denied each and every such allegation, this Court has not determined or adjudicated and by this decree does not determine or adjudicate, and this is not [fol. 570] a decree to the effect that any of said defendants has violated or is now violating any of such laws, or any other statute; and this decree relates solely to future conduct herein below specified and is not based upon any finding, determination, or adjudication that any right or statute has yet been or is now being violated.

II

Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required.

III

No consenting defendant engaged in the distribution of motion pictures (hereinafter referred to as a distributor

defendant) shall license or offer for license [1] a feature motion picture [2] (hereinafter sometimes referred to as a feature) for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown [3] within the exchange dis- [fol. 571] trict [4] in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a trade publication [5] having general circulation among exhibitors [6] in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

IV

(a) No distributor defendant shall offer for license or shall license more than five features in a single group. In offering its features for license to an exhibitor a distributor may change the combinations of features in groups as it may from time to time determine, and may license or offer

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[1] License means (as a verb) to make an agreement, or (as a noun) an agreement, by which a distributor grants the right to exhibit a motion picture in any theatre engaged in the exhibition of motion pictures for profit.

[2] A feature motion picture is a motion picture approximately 5,000 feet, or more, in length.

[3] A trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally.

[4] Each distributor defendant shall file with the Department of Justice a map of each of its exchange districts, showing the territorial limits thereof. Changes in the territorial limits of an exchange district shall be made only after two weeks' notice to the Department of Justice. References in this Section and in Sections V, IX and XVIII hereof to exchange districts are to exchange districts of each distributor defendant, as constituted from time to time.

[5] Trade publication means a daily or weekly newspaper or magazine which is devoted primarily to news concerning the motion picture industry.

[6] Exhibitor means any individual, partnership, unincorporated association or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit.

for license as many groups of features as it may from time to time determine, provided that the license or offer for license of one group of features shall not be conditioned upon the licensing of another feature or group of features.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[1] or foreigns[2] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

[fol. 572] Where a license has been entered into, controversies arising upon a complaint by an exhibitor that the licensing to him of one group of features was conditioned by the distributor upon the licensing of another feature or group of features or the licensing of shorts or foreigns shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds thereof, not later than two days after receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application or applications for such features, shorts or foreigns. The power[3] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of such features was so conditioned; and, if the finding be in the affirmative, (2) an award cancelling the license for (or to the extent that it may relate to) such other feature or group of features, or such shorts or foreigns.

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[1] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[2] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

[3] When, in any arbitration under this decree, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

Where no license has been entered into, controversies arising upon a complaint by an exhibitor that a distributor defendant has offered for license to him more than five features in a single group or that the offer of a license to him of one group of features was conditioned upon the licensing of another feature or group of features, or the licensing of short or foreigns, shall be subject to arbitration. An exhibitor shall have no right to assert any claim that an offer so to license such features was so made or conditioned unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds therefor not later than five days after the exhibitor claims the alleged offer was made. The power [4] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such features was so made or conditioned; and, if the finding be [fol. 573] in the affirmative, (2) an award imposing upon the distributor making such offer a penalty in an amount not to exceed five hundred dollars ($500.00). Such penalty shall be payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

V

No license for features to be exhibited in theatres located in one exchange district [1] shall include theatres located in another exchange district, nor shall the licensing of features for exhibition in theatres located in one exchange district be conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district.

Controversies arising upon a complaint by an exhibitor thereby affected that the licensing by a distributor defendant of features for exhibition in theatres located in one exchange district was conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district shall be subject to arbitration. The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of features for exhibition

[4] See footnote 3 to this Section.

[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

in theatres located in one exchange district was so conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district; and, if the finding be in the affirmative, (2) an award imposing upon the distributor defendant so licensing features a penalty in an amount not to exceed five hundred dollars ($500.00), payable into the arbitration fund referred to in subdivison 8 of Section XXII hereof.

[fol. 574] VI

No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising upon a complaint by an exhibitor that, contrary to the provisions of this Section, a distributor defendant has refused so to license its pictures shall be subject to arbitration. The power[1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not, contrary to the provisions of this Section, the distributor has refused to license its pictures to the complainant for exhibition in said theatre; and, if the finding be in the affirmative, (2) an award directing the distributor to offer its pictures for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award

[1] See footnote 3 to Section IV.

the granting of a run in compliance therewith has had the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the arbitrator finds that [fol. 575] the granting of a run in compliance with the award has had the effect of reducing the distributor's total film revenue in said area, he shall vacate the award.[1]

VII

Controversies arising upon the complaint of an exhibitor that a feature licensed to him by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality served by such theatre on moral, religious or racial grounds shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless written notice of his election to cancel such feature, together with a statement of his reasons therefor, shall have been mailed to the distributor defendant at its Home Office not later than ten days after the receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application for such feature. In such event the license in so far as it relates to the exhibition of such feature in the theatre specified in the notice shall be deemed cancelled unless within five days after receipt of such notice, the distributor shall have mailed to the exhibitor a notice in writing of its denial of such claim and of its intention to arbitrate the controversy. The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the feature is generally offensive in the locality served by the exhibitor's theatre on moral, religious or racial grounds; and, if the finding be in the affirmative, (2) an award cancelling the license in so far as it relates to the exhibition of such feature in said theatre.

VIII

Controversies arising upon the complaint of an exhibitor [fol. 576] that the clearance[1] applicable to his theatre is

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[1] See footnote 3 to Section IV.

[1] Clearance means the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

unreasonable shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenue derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to [fol. 577] whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license

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[2] See footnote 3 to Section IV.

entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that, since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change,[2] he shall make a redetermination of the maximum clearance.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature,[3] provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and [fol. 578] to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

IX.

In booking prints for exhibition by exhibitors competing on the same run in the same exchange district,[1] a distributor defendant shall not withhold delivery of prints available in its exchange from one exhibitor in order to give a competing exhibitor a prior playing date not provided for in his license. It is recognized that distributors must be permitted discretion in the ordinary course of booking and distributing films in an exchange district when too few prints are available in the exchange for the playing date desired

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[2] See footnote 3 to Section IV.

[3] For the purposes of this Section, a special feature means a feature which for a period of time is exhibited at generally advanced first-run admission prices.

by two or more theatres. In such cases this Section shall have no application.

Violations of this Section shall be subject to arbitration and, if the arbitrator finds[2] that the distributor complained against has pursued a policy of withholding available prints from the complaining exhibitor in violation of this Section, he shall enter an award directing the distributor to discontinue such policy.

X.

A. Controversies arising upon a complaint by an independent exhibitor[1] that a distributor defendant has arbi- [fol. 579] license its features for exhibition on the run requested by said exhibitor in one of said exhibitor's theatres which was in existence or which replaced[2] a theatre in existence at the date of this decree shall be subject to arbitration.

B. In any such arbitration no award shall be made against a distributor defendant unless the arbitrator shall first find the following facts:

(1). The complainant is an independent exhibitor and the theatre operated by him and specified in his complaint was in existence at the date of the decree or replaced such a theatre; and

(2) Such refusal of the distributor to license its features for exhibition in the complainant's theatre on the run re-

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[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

[1] An independent exhibitor, as used in this Section, is one wholly independent of any circuit of more than five theatres and not affiliated either by stock ownership, common ownership; common buying or otherwise with a circuit of more than five theatres and whose licenses are not negotiated by a buying combine or common buying agent negotiating for more than five theatres.

[2] A theatre shall not be deemed to have replaced such an existing theatre unless erected in the same neighborhood as one which was destroyed or permanently abandoned as a theatre, for the purpose of succeeding to its patronage, and with a seating capacity not more than 25 per cent. greater than that of the theatre replaced.

quested by the complainant continued during a period of not less than three successive months; and

(3) The distributor during such period has licensed the features requested by the complainant on the run requested by him to a theatre (sometimes hereinafter referred to as a circuit theatre) which was in competition with the theatre specified in the complaint and which was a component of a circuit of not less than 15 theatres or which was affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of not less than 15 theatres or the licenses for which were negotiated by a buying combine or common buying agent negotiating for not less than 15 theatres; and

(4) The complainant's theatre has not available to it features sufficient in nature and quantity to enable it to operate on the run requested by the complaint; and

[fol. 580] (5) (a) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or

(b) Subsequent to July 20, 1940 and during the two consecutive motion picture seasons[3] immediately preceding the filing of the complaint, the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint and during such period exhibited on such run substantially all the features released during such period by the distributor complained against; or

(c) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant demanded in writing[4] features for the theatre specified in his complaint from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clear-

[3] A motion picture season means the period from September 1 of one year to August 31 of the next year.

[4] Demands in writing shall be deemed to include complaints in writing to the Department of Justice.

ance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; or

(d) The complainant operated the theatre specified in his complaint for at least one year prior to the entry of this decree, and subsequent to July 20, 1935, and prior to July 20, 1940 a prior operator of said theatre had demanded in writing [5] features from the distributor complained against on the same run as or on an earlier run than [fol. 581] that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; and

(6) Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on the run requested by the complainant was a circuit theatre.

C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributor; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each served; the competitive conditions in the area in which they are located;

[5] See footnote 4 to this Section.

their comparative suitability[6] for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre [fol. 582] if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom.

D. If in any such arbitration the arbitrator finds[7] for the complainant, he may enter an award against the distributor which shall not affect the license to exhibit any feature then under license to the circuit theatre but which shall prohibit such distributor from thereafter licensing its features for exhibition either in the circuit theatre specified in the complaint on the run requested by the complainant, or in the complainant's theatre specified in the complaint, on such run, otherwise than by a separate contract or agreement which shall not be a part of any contract or agreement for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.

E. After a final award in favor of a complaining exhibitor has been made under this Section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who entered the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor against which it was entered. If in any such proceeding the arbitrator shall find[7] that the distributor has not complied in good faith with the original award, the arbitrator may award damages

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[6] In considering this factor in situations where the exhibitor customarily exhibits features in two or more theatres on the same run in the same situation as a unit by contracting for groups of features on an "or" basis (i.e. for exhibition at one of two or more specified theatres) all of such theatres may be considered collectively as a unit.

[7] See footnote 3 to Section IV.

to the exhibitor for loss resulting from the distributor's failure to comply with the original award but any such award of damages shall be purely compensatory.

Any further arbitration proceeding for an award of damages for violation of the original award must be commenced [fol. 583] within sixty days after such violation has occurred, by filing a statement specifying the facts constituting each alleged violation for which damages are sought and the exhibitor's alleged damages resulting from each such alleged violation. No award of damages shall be made in any such proceeding for any violation of the original award not occurring within said sixty day period, but prior violations may, in any such proceeding, be considered by the arbitrator as evidence bearing upon the question of the distributor's good faith.

XI

(1) For a period of three years after the entry of the decree herein each of the consenting defendants will notify [1] the Department of Justice immediately of any legally binding commitment for the acquisition by it of any additional theatre or theatres.

(2) During such period each such defendant will also report to the Department of Justice on or before the tenth day of each month the changes in its theatre position, if any, that have occurred during the preceding month, as follows, together with a statement of the reasons for such changes:

(a) Theatres contracted to be built or under construction;

(b) Theatres lost or disposed of;

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[1] The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

(c) Theatres acquired;

(d) Interests in theatres acquired, with a statement of the nature and extent of such interests.

(3) If upon receipt of such information the Department of Justice requests any such defendant to furnish further information with respect to any of the above transactions in which it is involved, such defendant will make a reasonable effort to supply such information promptly.

[fol. 584] (4) No information furnished under subdivision (1), (2) or (3) hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business. Proceedings based on a violation of this subdivision (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section.

XII

(a) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, requiring each of them to trade show its features before licensing the same for exhibition, Section III of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(b) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corpora-

tion, Universal Corporation and Columbia Pictures Cor-
[fol. 585] poration, limiting the number of features which may be licensed in a single group, subdivision (a) of Section IV of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(c) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions requiring each of them to trade show its features before licensing the same for exhibition, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with Section III of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject said defendant or defendants to such provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of Section III of this decree.

(d) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions limiting the number of features which may be licensed in a single group, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with subdivision (a) of Section IV of this decree and to comply with said provisions of such decree
[fol. 586] against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject such defendant or defendants to said provisions of such other

decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of subdivision (a) of Section IV of this decree.

(e) If, prior to June 1, 1942, (1) a decree containing the provisions referred to in subdivision (c) hereof, or (2) a decree containing the provisions referred to in subdivision (d) hereof, or (3) a decree containing the provisions referred to in both of said subdivisions, shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, but an appeal therefrom has been taken or any of said provisions have not become operative and of full force and effect, then the operation of the provisions dealing with the same subject matter contained in Section III or subdivision (a) of Section IV of this decree shall be suspended and shall be of no binding force and effect upon any consenting defendant except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to said date and subsequent to August 31, 1941, unless and until such decree shall become final and such provisions shall be in full force and effect against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation. After such decree shall have become final, any consenting defendant may at any time exercise its right of election provided for in subdivisions (c) and (d) of this Section.

(f) If, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall require the trade showing of features before licensing the same for [fol. 587] exhibition, each of the consenting defendants shall be relieved from further compliance with Section III of this decree, and if, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall limit the number of features that may be licensed in a single group, each of the consenting defendants shall be relieved from further compliance with subdivision (a) of Section IV of this decree. In either of such events any consenting defendant may at any time make application to this Court, of which notice shall be served upon Peti-

tioner and all other consenting defendants, for an order relieving the consenting defendants, and each of them, from further compliance with Section III or subdivision (a) of Section IV of this decree, or both, as the case may be, and vacating the same, and thereupon this Court shall make and enter such an order.

(g) At any time after September 1, 1943, any consenting defendant may move to vacate the then effective provisions of Section III and subdivision (a) of Section IV of this decree by filing an application under oath stating that during any consecutive twelve months period preceding the filing of such application either (1) distributors of motion picture films have licensed 25 per cent or more of the features released for exhibition in the United States otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree [1] or (2) 12½ per cent or more of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, has been derived from pictures licensed otherwise than in accordance with the then effective provisions of the Section III and subdivision (a) of Section IV of this decree. [1]

[fol. 588] Petitioner and all other consenting defendants shall be served with notice of the filing of such application.

Upon such application the Court shall enter an order relieving the defendants from further compliance with the provisions of Section III and subdivision (a) of Section IV of this decree, unless within sixty (60) days after service of such application Petitioner shall establish to the satisfaction of the Court that during said twelve months period less than 12½ per cent of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, had been derived from pictures licensed otherwise than in accordance with the then effective provisions of Sec-

[1] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

tion III and subdivision (a) of Section IV of this decree.[2]

(h) At any time after September 1, 1942 any consenting defendant may apply to the Court to vacate the provisions of Section III and subdivision (a) of Section IV of this decree, or the provisions of either of such Sections, and upon such application, the Court shall enter an order relieving the consenting defendants from further compliance with such provisions, upon such defendant showing to the satisfaction of the Court that, subsequent to said date and by reason of the competition of persons not selling exclusively in accordance with said provisions of said Sections, or of either of them,[2] compliance by the applicant defendant with such provisions of said Sections, or of either of them, has substantially and adversely affected the applicant defendant's business.

XIII

Nothing contained in this decree shall apply to operations or activities of any consenting defendant outside of [fol. 589] the continental United States[1] or to operations or activities of any consenting defendant within the continental United States in so far as they relate to the distribution or exhibition of motion pictures outside of the continental United States.

XIV

Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing[3] of such picture upon such terms and conditions as may be fixed by the distributor.

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[2] See footnote 1 to this Section.

[1] Section XIII. The continental United States as used herein means the territory within the boundaries of the forty-eight states and the District of Columbia.

[3] Section XIV. Road showing is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar.

XV

The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof.

XVI

No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such de- [fol. 590] fendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award [1] made and entered in such an arbitration proceeding.

XVII

Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right of each distributor defendant [1] to license the exhibition, or

[1] Section XVI. For the purposes of this Section on the final award in any arbitration proceeding under Section X of this decree shall be only a final award for damages as therein provided.

[1] Section XVII. For the purpose of this Section (1) defendant RKO Radio Pictures, Inc., or its successors, shall be deemed to have the same interests in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Radio-Keith-Orpheum Crporation, or its successors, directly or indirectly, has; and (2) defendant Vitagraph, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Warner Brothers Pictures, Inc. or its successors, directly or indirectly, has.

in any way to arrange or provide for an exhibition in such manner, upon such terms and subject to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which it directly or indirectly, by stock ownership or otherwise, owns a financial interest at the time of the entry of this decree and also at the time of such license, and (2) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which such distributor defendant acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent and (3) in any theatre in the ownership, lease, [fol. 591] management, or operation, or in the proceeds or profits from the management or operation, of which a company in which such defendant owned not less than 42 per cent of the common stock at the date of the decree and at the time of such license,[2] acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent.

XVIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any con-

[2] In the case of the distributor defendant Twentieth Century-Fox Film Corporation, or its successors, the defendant National Theatres Corporation, or its successors, shall be deemed to be such a company if said distributor defendant owned not less than 42 per cent of its common stock at the date of the decree and not less than 35 per cent of its common stock at the time of such license, provided not less than 42 per cent of its common stock is owned by Twentieth Century-Fox Film Corporation, or its successors, and by present or future officers or directors of National Theatres Corporation, or its successors.

senting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present. Without in any way limiting the rights granted in the foregoing [fol. 592] provisions of this Section, each of the distributor defendants shall keep at its principal office current records, which shall be accessible for the purpose aforesaid, showing—

(1) The dates when and the places where each of its features is trade shown, the names of the trade publications wherein notice of each trade showing was published, and the dates of publication; the name and location (by town and exchange district [1]) of each theatre in which each feature is licensed for exhibition, and the date of license thereof;

(2) As to each license entered into by it, the date thereof and the names and location (by town and exchange district [1]) of the theatres involved, the names of the parties thereto and of the distributor's sales representative who negotiated the license, and the names of the features licensed for exhibition;

(3) All arbitration awards rendered against the distributor with a statement showing what the distributor has done to comply therewith.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

[1] See footnote 4 to Section III.

XIX

Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the [fol. 593] right of any distributor defendant to select its own customers, to bargain with them in accordance with law, or to negotiate with or to license to or to accept any offer from any exhibitor to license its motion pictures or any number thereof upon such terms and conditions as it deems advisable or to its best interests.

XX

The provisions of Section III, of subdivision (a) of Section IV, of Section V and of Section X of this decree shall have application only with respect to features released in the United States after August 31, 1941.

XXI

Petitioner, by its counsel, has represented to the Court that the public interest requires that the provisions of this decree shall operate for a trial period of three years from the date of entry hereof. Petitioner has further represented to the Court, and each of the consenting defendants has consented to the entry of this decree upon the condition, that Petitioner will not for a period of three years after the entry of this decree, either in this action or any other action or proceeding against any such defendant seek either the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the Petition filed herein July 20, 1938, or in paragraphs (5), (6) and (7) of Section VIII of the Amended and Supplemental Complaint filed herein November 14, 1940, or otherwise seek to divorce the production or distribution of motion pictures from their exhibition; or to dissolve any such defendant or any corporation in which any such defendant has, directly or indirectly, a substantial stock interest and which is engaged in the exhibition of motion pictures or holds directly or indirectly a substantial stock interest in any corporation so [fol. 594] engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interest or any thereof, direct or indirect, in motion picture theatres in which it had an interest at the date of the entry of this decree.

XXII

1. The method and conditions of and the procedure for the arbitration of claims and controversies hereinbefore provided for in this decree, as well as the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in an action entitled "United States of America, Petitioner, against Balaban & Katz Corporation, et al., Defendants", modifying a consent decree entered in said action on April 6, 1932 and the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Southern District of California, Central Division, in an action entitled "United States of America, Plaintiff, vs. West Coast Theatres, Incorporated, et al., Defendants", modifying a consent decree entered in said action on August 21, 1930, shall be as specified in this Section and in the Rules of Arbitration and Appeals which are provided for hereinafter.

2. An arbitration system for the arbitration of claims and controversies referred to in this decree shall be administered by an impartial Administrator.

The Administrator shall establish and maintain an Arbitration Tribunal in each city in the United States in which three or more of the distributor defendants shall maintain exchanges.

[fol. 595] The Administrator shall establish and maintain a panel of not less than ten arbitrators for each Arbitration Tribunal and shall establish and maintain suitable offices and personnel, including a clerk, for each Arbitration Tribunal and for the Appeal Board provided for hereinafter. The Administrator shall have the power to appoint and remove members of the panels and personnel.

3. No person shall be appointed a member of any panel of arbitrators who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre as landlord, lessor, or otherwise.

4. The American Arbitration Association is appointed Administrator of the arbitration system under this decree,

and is authorized and directed to perform the duties and functions of such Administrator until further order of the Court.

Any successor to the American Arbitration Association as Administrator shall be appointed by the Court on the joint application and recommendation of the Petitioner and of a majority of the distributor defendants, except that if the Petitioner and a majority of the distributor defendants fail to join in making such application and recommendation the successor Administrator shall be appointed by the Court.

5. There shall be a Budget Committee consisting of three members, one of whom shall be appointed by the Administrator, one of whom shall be appointed by the distributor defendants, and one of whom shall be the Chairman of the Appeal Board. The Budget Committee shall budget the cost of the maintenance and operation of the arbitration system. Such budget for the first twelve months of the operation of the arbitration system shall not exceed four hundred ninety thousand dollars ($490,000.00) except with the consent of a majority of the distributor defendants. [fol. 596] The budget for each succeeding twelve months period shall not exceed four hundred sixty-five thousand dollars ($465,000.00), except with the consent of a majority of the distributor defendants, provided, however, that the Court may, on the application of the Petitioner, and for good cause shown, order an increase in the budget for any year in such amount, not exceeding fifty thousand dollars ($50,000.00), as it may find necessary for the effective operation of the arbitration system.

6. Each arbitrator shall be selected and each arbitration proceeding shall be conducted in the manner prescribed by the Rules of Arbitration and Appeals which are filed herewith and are hereby approved. Such Rules may be amended or added to from time to time by the Administrator with the approval of a majority of the Appeal Board upon notice to the Petitioner and to the distributor defendants of such proposed amendments or additions and an opportunity for a hearing thereon. No amendment of or addition to such Rules shall change the qualifications of arbitrators as set forth in Rule II of such Rules or deny to any exhibitor or distributor defendant the right

to intervene as a party in any proceeding by which it may be affected or deny to any party to any arbitration proceeding the right to receive notice of all proceedings therein; to participate in the selection of arbitrators; to challenge the qualifications of arbitrators; to be represented by counsel or otherwise; to secure the production of witnesses and of evidence; to examine and cross-examine all witnesses; and to appeal to the Appeal Board from any adverse award. The Rules may provide for the arbitration of claims and controversies between distributor defendants and exhibitors other than claims or controversies referred to in subdivision 1 of this Section which by agreement between the parties thereto shall be submitted to the tribunals.

7. There shall be an Appeal Board which shall have jurisdiction to determine appeals from awards made by the [fol. 597] Arbitration Tribunals. It shall consist of three members appointed by the Court, each of whom shall be a person of known impartiality and distinction. Each such member shall be appointed for a term of three years and shall serve during such terms unless he shall be removed by order of the Court or shall resign. Each member of the Appeal Board shall be eligible for reappointment.

If any member of the Appeal Board is disqualified from passing upon any appeal, or is temporarily unable because of illness, absence or other cause to act as a member of the Appeal Board, the Court may on application of one or more members of the Appeal Board appoint another person of known impartiality and distinction to act as a temporary member of the Appeal Board in place of the member so disqualified or unable to act. The compensation of such temporary member shall be fixed by the Court.

One member of the Appeal Board shall be designated by the Court as the Chairman of the Board.

The members of the Appeal Board shall be compensated on an annual basis. The Chairman of the Board shall be paid twenty thousand dollars ($20,000.00) per annum, and each of the other members of the Board shall be paid seventeen thousand five hundred dollars ($17,500.00) per annum.

The Appeal Board shall have its offices in New York, New York.

8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such

fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Section IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. Such amounts shall be assessed by the [fol. 598] Administrator to and shall be paid by the several distributor defendants in amounts proportionate to their respective gross receipts from licenses for the exhibition of motion pictures in the United States. The proportionate gross receipts of such defendants during the 1939-40 motion picture season shall be used in determining the amount to be paid by each such defendant for the expenses of establishing the arbitration system and of maintaining it during the first twelve months of its operation. Thereafter the gross receipts for the motion picture season ending on the August 31st immediately preceding the start of the particular twelve months period shall be used in determining such amounts.

Each distributor defendant shall inform the Administrator promptly after the end of each motion picture season of its total gross receipts during such motion picture season from licenses for the exhibition of motion pictures in the United States. Such information shall be treated by the Administrator as confidential and shall not be divulged except as required by law.

9. Any person who has the right to institute an arbitration proceeding under any provision of this decree or of any other decree referred to in subdivision 1 of this Section may institute and prosecute such proceeding in the manner and subject to the conditions specified in the Rules of Arbitration and Appeals, upon the condition that such person file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide in substance that such complaint submits the controversy to arbitration and undertakes to abide by and to comply fully with whatever final award may be entered therein.

Any exhibitor or distributor who intervenes as a party in any arbitration proceeding as provided in the Rules of Arbitration and Appeals, shall file with the Clerk of [fol. 599] the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Ad-

ministrator, which shall provide, in substance, that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein.

Representatives of the Department of Justice, duly authorized in writing, shall be permitted reasonable access during regular office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Appeal Board, of the Arbitration Tribunal, and of the Administrator, which relate to the arbitration system and to the arbitration of claims and controversies under this decree.

XXIII

Jurisdiction of this cause is retained for the purpose of:

(a) Enabling any of the parties to this decree to apply to the Court at any time for such orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of violations thereof;

(b) Enabling any of the parties to this decree to apply to the Court at any time for a modification of this decree in order to conform it to any Act of Congress enacted after the entry of this decree;

(c) Enabling any consenting defendant to make application to the Court referred to in any provision of this decree;

(d) Enabling any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof;

(e) Enabling any consenting defendant to apply to the Court at any time more than three years after the date [fol. 600] of the entry of this decree, to vacate this decree, or any modification thereof, or to vacate or modify any provision thereof; on the ground that under the economic or competitive conditions existing at the time of such application, this decree or any modification thereof, or any provision thereof, is inappropriate or unnecessary, or

oppressive or unduly burdensome, regardless of whether or not such economic or competitive conditions are new or unforeseen. The right of each consenting defendant to make any such application and to obtain such relief is expressly reserved by them and is hereby expressly granted.

Whenever obligations or prohibitions are imposed upon the defendants by the laws of any State or by rules or regulations made pursuant thereto, with which the defendants by law must comply, the Court, upon application of the defendants, or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws, rules or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party to this decree under the provisions of this Section shall be made in open court upon notice to all of the other parties to this decree, and each such party, upon such application, shall have the right and privilege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

Dated November 20th, 1940.

(S.) Henry W. Goddard, United States District Judge.

[Vol. 601] We hereby consent to the entry of the foregoing decree.

For the plaintiff:

(S.) John T. Cahill, United States Attorney.

(S.) Thurman Arnold, Assistant Attorney General; James V. Hayes, Robert E. Sher, Robert L. Wright, A. H. Feller, Special Assistants to the Attorney General.

For the defendants:

Paramount Pictures Inc., Paramount Film Distributing Corporation, by (S.) Thomas D. Thacher, Simpson Thacher & Bartlett, 120 Broadway, New York, N. Y., Their Attorneys; Loew's, Incorporated, by (S.) John W. Davis, Esq., 15 Broad

Street, New York, N. Y., (S.) J. Robert Rubin, Esq., 1540 Broadway, New York, N. Y., Its Attorneys; Radio-Keith-Orpheum Corporation, RKO [fol. 602] Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, by (S:) William J. Donovan, Esq., Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y., William Mallard, Esq., 1270 Sixth Avenue, New York, N. Y., Ralstone R. Irvine, Esq., 2 Wall Street, New York, N. Y., Otto C. Doering, Jr. Esq., 2 Wall Street, New York, N. Y., Their Attorneys; Keith-Albee-Orpheum Corporation, by (S.) Monroe Goldwater, Esq., Goldwater & Flynn, 60 East 42nd Street, Its Attorneys; Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, by (S.) Joseph M. Proskauer, 11 Broadway, New York, N. Y., Robert W. Perkins, Esq., 321 West 44th Street, New York, N. Y., Their Attorneys; Twentieth Century-Fox Film [fol. 603] Corporation, National Theatres Corporation, by (S.) Richard E. Dwight, Esq., Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y., Their Attorneys.

(Filed November 20, 1940.)

[fol. 604] In the District Court of the United States

[Title omitted]

[File endorsement omitted.]

Request to Stipulate—Filed July 9, 1941

To the Honorable O. W. Hughes, Attorney for Plaintiff, Custom House, Nashville, Tennessee.

Sir:

Please take notice that Anthony Sudekum, R. E. Baulch and Kermit C. Stengel, and the corporate exhibitor defendants, hereby request the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit at the service of this request, for the purposes of the above entitled

action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. All of the defendant exhibitors are affiliated, directly or indirectly, through stock ownership, family connection or otherwise, with the defendant, Anthony Sudekum, who is President of the defendant, The Crescent Amusement Company, which has been engaged in the business of operating fendant exhibitors. Mr. Sudekum has had a longer and motion picture theatres longer than any of the other dewider experience in the motion picture business than any of the other individual defendants or officers of corporate defendant exhibitors. During the period covered by this suit, the other individual defendants and officers of corporate defendant exhibitors have from time to time conferred with Mr. Sudekum and asked his advise in regard to all sorts of [fol. 605] matters affecting their respective operations, including the operation of theatres, the exploitation of pictures, and the making of contracts with film companies, including the defendant distributors and the distributors who were formerly defendants in the case but as to whom the suit was subsequently dismissed. Mr. Sudekum has, however, actually carried on negotiations for film contracts with said distributors only on behalf of The Crescent Amusement Company, Nu-Strand Corporation from 1934 until it ceased operating theatres in 1938, and, since the death of Mr. C. A. Crute in April, 1939, for the Lyric Amusement Company, Inc. In a relatively few instances, as compared with the number of contracts negotiated, where one of the other defendant exhibitors and a distributor have reached a deadlock in negotiations for a contract, Mr. Sudekum has, on the request of the defendant exhibitor or the distributor—more frequently the distributor, intervened and assisted in breaking the deadlock by offering suggestions to the defendant exhibitor or the distributor, or both, but in no such instance has he actually consummated the deal. There may have been some rare instance where he did consummate such a deal but he would testify he does not recall any. In a few instances where a special subject has been offered by a distributor, Mr. Sudekum has, at the request of the distributor's salesman and, because of time element, telephoned the film buyers for other defendant exhibitors in other towns and advised them of the terms of

the deal and secured their approval, after which he completed the transaction.

2. The defendant, Kermit C. Stengel, has negotiated all film contracts on behalf of Rockwood Amusements, Inc., since the latter's incorporation, except that prior to 1938, when Mr. Stengel was learning the amusement business, these contracts were negotiated with the active assistance of Mr. Sudekum. Mr. Stengel has usually sat in with Mr. Sudekum in the latter's negotiation of film contracts in behalf of The Crescent Amusement Company and Lyric [fol. 606] Amusement Company, Inc., and has taken part in said negotiations. Mr. Stengel has negotiated all contracts on behalf of Kentucky Amusement Co., Inc. and Lawrenceburg Theatres, Inc. since these two corporations were incorporated. Prior to 1938 Mr. Earle Hendren negotiated the contracts for Cherokee Amusements, Inc., and Mr. J. W. Baird for Newport Amusements, Inc., but from and after 1938 Mr. Stengel has negotiated the contracts for said two corporations. Mr. Stengel has usually negotiated for all these corporations at one sitting as to towns served from the same Exchange, or in case of dealing with the District Manager for several Exchanges; and these negotiations have usually been conducted in Mr. Stengel's office in Nashville, Tennessee, either after or before the negotiations on behalf of The Crescent Amusement Company and Lyric Amusement Company, Inc. have been conducted in Mr. Sudekum's office, which is in the same building. The defendant, Louis Rosenbaum, during the entire period covered by this suit has negotiated the film contracts for Muscle Shoals Theatres (including Muscle Shoals Theatres, Inc., before the corporation was dissolved). Mr. Cowan Oldham has negotiated the film contracts for Cumberland Amusement Company since May 10, 1939, when Mr. H. T. Hill sold his interest in the corporation. Mr. Hill formerly negotiated the contracts for Cumberland Amusement Company. Mr. G. W. Haynes has negotiated contracts for Strand Enterprises, Inc. during the entire period covered by this suit.

3. (a) The Crescent Amusement Company operates theatres in towns scattered throughout the entire State of Tennessee, as well as a few theatres in Alabama and Kentucky, but mainly in larger towns. Crescent's affiliate,

Lyric Amusement Company, Inc., operates theatres only in Huntsville, Alabama.

[fol. 607] The theatres operated by Crescent's affiliates, Strand Enterprises, Inc., and Cumberland Amusement Company, and by Rockwood Amusements, Inc., and the latter's affiliates, Cherokee Amusements, Inc., Newport Amusements, Inc., Kentucky Amusements, Inc., and Lawrenceburg Theatres, Inc., are mainly in smaller towns. Kentucky Amusements, Inc., operates only one theatre, which is in Elizabethtown, Ky. None of the defendant exhibitors operates a theatre in the same town in which another of the defendant exhibitors operates a theatre. Nu-Strand Corporation formerly operated theatres in Kingsport, Tennessee, but in 1938 leased them to another concern and since then has not been an operating company.

(b) Strand Enterprises, Inc., operates theatres in West Tennessee, Eastern Arkansas, Northern Mississippi and Western Kentucky. The Crescent Amusement Company operates theatres in Paris, Union City and Dyersburg, Tennessee, and Princeton, Kentucky, which towns are in the same territory. Rockwood Amusements, Inc., operates theatres in McKenzie and Huntington, Tennessee, which towns are also in the same territory.

(c) Cumberland Amusement Company operates theatres in Middle Tennessee and in the Cumberand Mountain section of Tennessee. The Crescent Amusement Company operates theatres in Cleveland, Murfreesboro, Columbia and Lebanon, Tennessee, which are in the same territory. Rockwood Amusements, Inc., operates theatres in Tracy City, Manchester, Rockwood and Cowan, Tennessee, which towns are in the same territory. Newport Amusements, Inc., operates theatres in Copper Hill, Tennessee, which is in the same territory.

(d) Cherokee Amusements, Inc., operates theatres in East Tennessee and Western North Carolina. The Crescent Amusement Company operates theatres in Maryville, Greeneville, Harriman and Morristown, Tennessee, which are in the same territory. Rockwood Amusements, Inc., operates theatres in Clinton, Lake City and Rogersville, [fol. 608] Tennessee, which are in the same territory. Newport Amusements, Inc., operates theatres in Newport, Tennessee, which is in the same territory. Nu-Strand Corpora-

tion has an interest in theatres in Kingsport, Tennessee, which is in the same territory.

(e) Muscle Shoals Theatres operates theatres in Northern Alabama. The Crescent Amusement Company operates theatres in Decatur and Gadsden, which are also in Northern Alabama, and Lyric Amusements, Inc., operates theatres in Huntsville, Alabama, which is in the same territory. Lawrenceburg Theatres, Inc., operates a theatre in Lawrenceburg, Tennessee, which is not far from the Alabama towns in which Muscle Shoals Theatres operates theatres.

4. (a) The following tabulation is approximately correct as to the features released in the United States market during the years 1934-1939, inclusive. "Major Companies" refers to the following eight companies: Columbia, Fox, MGM, Paramount, United Artists, Universal, Warner and RKO:

	1939	1938	1937	1936	1935	1934
Total Releases	761	769	778	735	766	662
Major Companies	388	362	408	362	356	361
Independent Companies	373	407	370	373	410	301
Major Companies	388	362	408	362	356	361
U. S. Produced	367	346	393	348	340	350
Imported	21	16	15	14	16	11
Independent Companies	373	407	370	373	410	301
U. S. Produced	116	109	145	174	185	130
Imported	257	298	225	199	225	171
U. S. Produced	483	455	538	522	525	480
Major Companies	367	346	393	348	340	350
Independent Companies	116	109	145	174	185	130
Imported	278	314	240	213	241	182
Major Companies	21	16	15	14	16	11
Independent Companies	257	298	225	199	225	171

[fol. 669] (b) The following tabulation correctly states the number of features released by the Major Companies during the years 1934-1939, inclusive:

	1934	1935	1936	1937	1938	1939
Columbia	43	49	52	52	53	55
Fox	52	52	57	51	56	59
MGM	43	47	45	51	46	50
Paramount	55	63	68	61	50	58
RKO	46	40	39	53	43	49
United Artists	20	19	17	25	16	18
Universal	44	37	28	37	46	46
Warner	58	49	56	68	52	53

(c) No one of the eight Major Companies during the period covered by this suit has distributed more than 15%

of the feature pictures exhibited in the territory in which the defendant exhibitors have operated theatres, and no one distributor has done more than 20% of the business from the standpoint of film rental collected in said territory during said period. The eight major distributors, during the period from August, 1934, to August, 1939, collectively released more than ninety per cent of the first class pictures exhibited by the defendant exhibitors, and said distributors have collectively released more than seventy-five per cent of all feature pictures exhibited in the towns in which the defendant exhibitors have operated theatres.

Geo. H. Armistead, Jr., Attorney for Defendants, The Crescent Amusement Company et al. Of Counsel: Armistead, Waller, Davis & Lansden.

[fol. 610] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted]

PLAINTIFF'S RESPONSE TO REQUEST TO STIPULATE—Filed July 21, 1941

To: Armistead, Waller, Davis & Lansden, Attorneys for Defendants, American Trust Building, Nashville, Tennessee.

SIRS:

Plaintiff herein makes the following response to the request heretofore *served on plaintiff on July 12, 1941*, by counsel for the defendants, Crescent Amusement Company, et al, pursuant to Rule 36 of the Federal Rules of Civil Procedure:

1. Plaintiff admits the first three sentences of paragraph one of defendants' request. Plaintiff neither admits nor denies the remainder of paragraph one of defendants' request, for the reason that matters set forth therein are peculiarly within the knowledge of the defendents, and for the further reason that plaintiff believes the evidence will show that Mr. Sudekum exercised a greater degree of control over the film buying of the defendant exhibitors than that set forth therein.

2. Plaintiff denies the first sentence of paragraph two of defendant's request. Plaintiff admits the second and third sentences of paragraph two of defendants' request. Plaintiff denies the fourth and fifth sentences of paragraph two of defendants' request. Plaintiff admits the remainder of paragraph two of defendants' request with the express reservation that the contracts referred to therein were not [fol. 611] negotiated without the active advice and assistance of the defendants, Sudekum and Stengel.

3 (a) Plaintiff admits paragraph 3 (a) of defendants' request.

(b) Plaintiff admits paragraph 3 (b) of defendants' request, with the exception of the two clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(c) Plaintiff admits paragraph 3 (c) of defendants' request, with the exception of the three clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(d) Plaintiff admits paragraph 3 (d) of defendants' request, with the exception of the four clauses therein which read as follows: "which towns are in the same territory." Plaintiff does not admit said clauses for the reason that same are argumentative and for the reason that the locations of the various towns involved speak for themselves.

(e) Plaintiff admits paragraph 3 (e) of defendants' request, with the exception of the clauses "which is in the same territory" and "which is not far from the Alabama towns in which Muscle Shoals Theatres operates theatres." Plaintiff does not admit said clauses for the reason that same are argumentative and that the locations of the towns involved speak for themselves.

4 (a) Plaintiff admits paragraph 4 (a) of defendants' request.

[fol. 612] (b) Plaintiff admits paragraph 4 (b) of defendants' request.

(c) Plaintiff neither admits nor denies the first sentence of paragraph 4 (c) of defendants' request for the reason that plaintiff does not have sufficient knowledge upon which to admit or deny said sentence. Plaintiff admits the second sentence of paragraph 4 (c) of defendants' request.

Robert L. Wright, Attorney for Plaintiff.

STATE OF TENNESSEE,
County of Davidson, ss:

Robert L. Wright, being duly sworn, deposes and says: I have read the foregoing statement. The facts stated therein are true to the best of my knowledge, information and belief.

Robert L. Wright. Sworn to before me this 21st day of July, 1941, Nashville, Tennessee. Brandon Lewis, Dep. Clerk.

[fol. 613] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 54—Civil

UNITED STATES OF AMERICA, Plaintiff

vs

CRESCENT AMUSEMENT CO., ET ALS, Defendants

Portions of Plaintiff's Evidence—Filed January 12, 1944

[fol. 614] Mr. Wright: We wish to call Mr. Earl Hendren now. We are calling him as an adverse witness under Rule 43. He is secretary-treasurer of Cherokee Amusements.

Thereupon EARL HENDREN, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Where do you live, Mr. Hendren?
A. I beg your pardon.

Q. Where do you live?
A. Erwin, Tennessee.
Q. What is your occupation?
A. In the theatre business.
Q. You are secretary-treasurer of the Cherokee Amusements, Inc.?
A. Yes sir.
Q. A defendant in this suit?
A. Yes sir.
Q. How long have you held that position?
A. About four and a half years.
Q. You were served with subpoenaes in this case, were you not?
A. Yes sir.
Q. Did you bring those with you.
A. Yes sir.
(Handing papers to counsel).

[fol. 615] The Court:
He asked you if you brought your subpoena with you.
A. No sir.

The Court:

Well, he wouldn't have the subpoena. He might have been served over the telephone.

Mr. Wright:

Q. You were served with two subpoenaes, were you not, one directed to the Cherokee Amusements, Inc. and another to you individually?
A. Yes sir.
Q. And is this folder that you have just handed me, does that contain the documents that you have produced in response to the subpoena?
A. Yes sir.

[fol. 616] Mr. Armistead: May it please the Court, I don't want to object to counsel for the plaintiff inspecting the documents that this witness has produced here in compliance with the subpoena duces tecum all right, but this looks like it is a search and seizure. They have been brought here and they want to look through them.

The Court: He can look through the documents and ask him what each one is.

Mr. Armistead: Yes, sir, but I do object to his looking through the files in a searching inspection; We object to that.

The Court: (To witness)

Q. Is there anything in there that would be in any way privileged? I don't know whether you know whether or not it would be; but would there be anything in there that might tend to incriminate either you or any officer of your company in any criminal offense?

[fol. 617] A. No, sir.

The Court: What is the objection, Mr. Armistead, to this line of proof.

Mr. Armistead: We object to bringing these files down here and going through them to see what they want.

The Court: Your can reach the same result by going through the file and asking what each document is?

Mr. Armistead: We don't want to take up the time for them to do that.

The Court: I overrule that objection. All right, hand the file to him and let him say what each document is.

Mr. Armistead: No, may it please the Court, we wont impose that burden on the Court.

The Court: Well, that is the only way I know how to do [fol. 618] it. It is just with you; if you make the objection I will order that done.

Mr. Armistead: Well, I will withdraw my objection, if your Honor please.

The Court: All right.

Mr. Wright: Q. When did you first enter the theatre business, Mr. Hendren?

A. About 1920.

Q. And where was that?

A. At La Follette, Tennessee.

Q. What town?

A. At La Follette, Tennessee.

Q. Have you continued to operate theaters until and through the year 1934?

A. Yes, sir.

Q. And where were you operating in 1934?

A. Greeneville, Tennessee.

Q. And what other locations?

A. At Sweetwater, Lenoir City, La Follette and Erwin, Tennessee.

Q. Were you operating at Maryville?

A. Not in 1934.

[fol. 619] Q. Were these theaters you describe being operated by you on leases?

Q. Yes, the buildings were under lease.

Q. You did not own any of the theater buildings?

A. No, sir.

Q. Were you leasing these theaters yourself or in partnership with any one?

A. It was a partnership.

Q. And who was your partner?

A. You are referring to 1934?

Q. Yes?

A. I don't recall whether that was the year that I was in partnership.

Q. Well, were you in partnership at about that time in the operation of theaters at those locations you have specified with Mr. Fred Gorman, were you, or not?

A. Yes, in Greeneville, Lenoir City and Sweetwater.

Q. And were you in partnership with any one else at the other locations that you have named?

A. Well, no—Well, part of the year I was a partner with Mr. Parrott and part of the year with Mr. Gorman.

Q. During the year 1934, did Mr. Gorman sell out his partnership interest to you?

A. Yes, sir.

Q. Do you remember when that was?

[fol. 620] A. Did you say when?

Q. Yes.

A. It was in February.

Q. You think it was that early in 1934?

A. Yes, sir.

Q. Couldn't it have been August, 1934?

A. No.

Q. And when did you first meet Mr. Sudekum?

A. I believe it was in 1934.

Q. What was the occasion for that meeting?

A. I believe I met him here in his office.

Q. Well, how did you happen to come over here to see him?

A. Well, we heard that he was going to build a theater in Greeneville, and we came over to see if it was true.

Q. You and Mr. Gorman came over?
A. Yes, sir.
Q. You saw him here in Nashville?
A. Yes, sir.
Q. And when was it, can you fix the approximate date?
A. It was in the early part of 1934, I guess.
Q. Well, were you still in partnership with Mr. Gorman?
A. Yes.
Q. And the conversation occurred in Mr. Sudekum's office?
A. Yes.
[fol. 621] Q. Was any one else present?
A. No.
Q. Can you recall what was said?
A. Well, part of the conversation.
Q. What can you recall?
Q. Well, I asked Mr. Sudekum if he was contemplating a theater in Greeneville, and he said he had an option on one there, that is, on the building, to remodel; and I also asked him if he thought the town was large enough for two theaters, and he said he did; and I asked him how much expense he had gone to in order to get the option, what was the cost of it up to that date, and he said it was negligible, wasn't much, and I asked him if he would take a cash consideration to not come in the town; he said he would not, he didn't do business that way, and he was more or less offended by the suggestion; he said it sounded like a bribe of some kind; he didn't do business that way, it wouldn't be fair to us and it wouldn't be fair to him.
Q. How large was Greeneville at that time?
A. Well, I think it was listed at about 7,000.
Q. In 1934?
A. Yes, sir.
Q. You are about a couple of thousand wrong about that, aren't you?
A. I could be, but I think it was that.
[fol. 622] Q. You were operating two theaters there, were you not?
A. Yes, sir.
Q. Is that all the conversation you had with Mr. Sudekum then?
A. Well, practically all the business conversation.
Q. Then, did Mr. Sudekum open a theater in Greeneville?

A. Yes, sir.

Q. When was that?

A. That was in the latter part of 1934.

Q. Before he opened his theater there, what film product had you been using at your theaters?

A. Well, just about all of them—all of the distributors.

Q. Well, can you name them? What were the principal ones?

A. I beg your pardon?

Q. What were the principal ones?

A. Fox, R. K. O. Paramount.

Q. Any others that are described as defendant distributors in this case?

A. Well, immediately prior to his opening a theater there I believe those were the principal major companies.

Q. Well, did you use the product of any other major company?

A. We did, yes, in time.

[fol. 623] Q. What others did you use from time to time?

A. Metro, Vitagraph, United Artists—Well, just all of them.

Q. Now, what was the policy you were operating those two theaters at Greeneville on?

A. You mean the program policy?

Q. Yes, how many changes a week?

Q. We were making three.

Q. At each theater?

A. No, at one theater, the Princess was making three; and the Palace was making one.

[fol. 624] Q. You were using three at the Princess and two a week at the Palace?

A. One a week at the Palace.

Q. Was it open all the week?

A. No, it was open on Friday and Saturday.

Q. Now after Mr. Sudekum opened his theater at Greenville, did you have any difficulty in obtaining suitable major product for your theaters?

A. No.

Q. When was the next time you talked to Mr. Sudekum?

A. I just do not recall, probably a year or so after he opened the theater in Greenville.

Q. And what led to this conversation?

The Court:

—. How did you happen to have this talk with him?

A. We came to Nashville to see him.

Mr. Wright:

Q. When you say we, who are you referring to now?

A. Mr. Parrott and I.

Q. Mr. Parrott had become your partner, after Mr. Gorman sold out?

A. Yes, sir.

Q. Did you talk to Mr. Sudekum in his office?

A. Yes, sir.

Q. Who else was present?

[fol. 625] A. No one.

Q. What was said then?

A. Well we told him we would like to work out some kind of deal with him to enter partnership with him, or something of that kind.

Q. What did he say?

A. Well he asked us what we had in mind as to price and so on, and we told him. He said that seemed to be rather high, and asked us to reconsider it and figure it, just the best we could do, and let him know.

Q. What was the price you quoted him?

A. I do not recall.

Q. Why was it that you made an offer to him to sell out?

A. Well we just heard that he was a good man to be with and he was a good theater operator and experienced, he could probably help us in various ways.

Q. In what ways did you think he could help you?

A. Well he was a good business man, he knew the business, knew the cooperation, operating policy, he just knew how to run the theaters.

Q. Did you think he could give you any help in procuring films?

A. We didn't know, we didn't need any films, that didn't enter into it.

Q. You can operate a theater without films, can you?

[fol. 626] A. Sir?

Q. Can you operate a theater profitably without films?

Mr. Armistead: May it please the Court, we object to that.

Mr. Wright: The witness has made an obvious mistake if he said he could operate a theater without films.

The Court: He meant he could get the films, he said he could get the films. When he said he didn't need any films, he meant he was getting plenty of films.

Mr. Wright:

Q. It is true, is it not, that the better films you can get, the more successfully you can operate a theater, isn't that right?

A. As a rule that is so, but lots of times you can operate a theater without the best films, if you know how to exploit them, and have an attractive house.

Q. Was that all the conversation you had with Mr. Sudekum then?

A. That is all I recall.

Q. When was the next time that you saw him?

A. Well that was about a month later.

Q. Where did you see him then?

A. He came over to Greenville.

[fol. 627] Q. Did you see him at your theater or his?

A. Saw him at his theater first, and I asked him to come up to our theater, and he did.

Q. Who was present then?

A. Mr. Stengle.

Q. Besides Mr. Sudekum and yourself?

A. Yes, sir.

Q. Any one else?

A. No, sir.

Q. What was said then?

A. Well we told him we would like for him to look our proposition over and make us a price on it, and he did.

Q. Did you accept it?

A. Yes.

Q. What was the price?

A. Twenty-five thousand dollars.

Q. That was for what theaters?

A. That was for Greenville, Maryville, and fifty per cent in Lenoir City, Lafollette and Irwin.

Q. That is, to sell outright the theaters at Greenville and Maryville and a half interest in the six you had in the other four towns; is that right?

The Court: To sell outright the theaters in Greenville [fol. 628] and Maryville, and a fifty per cent interest in the six shows he had in the other four towns.

Mr. Wright:

Q. Six shows in four other towns?

A. That is right.

Q. At that time you offered them to acquire for a consideration the theater at Maryville, as well as Greenville?

A. Yes, sir.

Q. When was that?

A. That was in 1934.

Q. How long before this conversation with Mr. Sudekum you just referred to?

A. You mean the last conversation we had with him?

Q. The one you have just been talking about when he made you this offer and you accepted it?

A. We were at the house in Maryville, about two years before.

Q. The date of this conversation you have just been telling me about, was in 1935, was it not?

A. 1936.

Q. 1936—and then you went into Maryville in 1934?

A. Yes.

Q. What time of the year?

A. In the fall.

[fol. 629] Q. And did you have a partner in that operation?

A. Well there wasn't in the operation, I was just working for it, Mr. Parrott was the man that went in there.

Q. What were you doing in connection with the operation?

A. Booking and buying pictures.

Q. You had no other interest in the theater?

A. Not at the time, the house was opened after.

Q. You subsequently acquired an interest in it?

A. Yes.

Q. When was that?

A. That was in either the latter part of 1935, or early part of 1936.

Q. And what was your interest?

A. Twenty-five per cent.

Q. And you bought that from Mr. Parrott?

A. Yes, sir.

Q. How much did you pay him for it?

A. I do not recall, but I bought twenty-five percent interest in that house and the twenty-five per cent interest in the rest of the theaters at the same time.

Q. I understood you to say that you were already operating the other theaters at that time?

A. I was under an operating lease arrangement.

Q. Did Mr. Parrott own those theaters you were operating, owned or leased?

A. Yes.

[fol. 630] A. Yes.

Q. You then acquired an interest in the theater buildings?

A. No, just the equipment.

Q. Then this twenty-five per cent interest that you purchased was the twenty-five per cent interest in the lease and equipment and so forth at Maryville, and in what other theaters?

A. Greenville, La Follette, Lenoir City, and Sweetwater. Mr. Parrott and I owned the theaters at Irwin, and the theatres in La Follette and Sweetwater.

Q. How many theaters were there in La Follete and Sweetwater?

Q. There were two in Sweetwater and two in La Follette.

Q. They were involved in the deal?

A. Yes.

Q. What did you pay for that twenty-five per cent interest?

Mr. Armistead: I do not see where that is material in this case.

The Court: I do not undertake to know what he has in mind, I think he is entitled to ask this question of an adverse witness, how does it affect this lawsuit, what he paid for it?

[fol. 631] Mr. Wright: We are trying to establish the sale that was made to Mr. Sudekum of his interest in these theaters, the deal that was closed was made at a sacrifice or less than the real worth of the theaters, or more, we are entitled to establish this sale.

Mr. Armistead: I still submit, may it please the court, it would be immaterial, what Sudekum paid for the interest; he could give it to him, if he wanted to.

Mr. Wright: That is precisely what we expect to show, that the half interest in the Cherokee Company was virtually given.

Mr. Waller: Of course that would involve what was the real value of the theaters, and if we go into that, we may have an endless proceeding.

The Court: How does all this tend to monopolize interstate commerce between the states?

Mr. Wright: May it please the Court, we have alleged here that Mr. Sudekum and these other defendants have done many things for the purpose of monopolizing the [fol. 632] exhibition of films in this area, and we have alleged his acquisition of theaters.

The Court: What has that got to do with monopolizing interstate commerce, suppose he got every theater in Tennessee, if it didn't affect the movement of Interstate Commerce.

[fol. 633] Mr. Wright: We have alleged here that Mr. Sudekum and these other defendants combined together for the purpose of monopolizing the exhibition of films in this area and one of the means that we alleged that was used was by coercive theater acquisition.

The Court: What has that got to do with interstate commerce? Suppose they owned every theater in the State of Tennessee, if it didn't affect interstate commerce, the Government would not be interested in it.

Mr. Wright: I think it affects it very materially, by monopolizing the business of licensing films to put in those theaters. The minute you suppress or destroy competition in the licensing of films you certainly are directly affecting interstate commerce and I don't think that is any question about the jurisdiction of the Court in a proceeding of that kind and the Sherman Act plainly applied to any sort of monopolistic activity which affects the licensing of films in interstate commerce. I think that is true beyond question.

The Court: Well, the statute says monopolizing trade or commerce among the several states. Is it the Government's theory that the purpose of acquiring these theaters was to monopolize the licensing of films in interstate commerce [fol. 634] between the states?

Mr. Wright: That was plainly one of the purposes. Whenever anyone acquires one of these closed theaters, the first thing he does is to free himself from competing with anybody else in the licensing of films and the business of licensing films is an interstate business.

The Court: Well, don't you think that possibly you have the cart before the horse. Don't you think the first proof in this case should be that it affects trade and commerce among the states in the shipment of films? Then show how

it was done. But here you are spending quite a good deal of time in showing that he had a monopoly which only affects intrastate.

Mr. Wright: That is the monopoly that we are attacking in the case.

The Court: A monopoly of the exhibition of moving pictures, I take it, would not be any violation of the Sherman Act, except incidentally, as affecting trade and commerce among the states in the shipment of films.

Mr. Wright: On that point, I can only say that we disagree with you. Our position is that the monopolization of [fol. 635] the control of theaters in any substantial section of the country, has the effect of eliminating and suppressing competition in the licensing of films and that thereby the Sherman Act is violated.

The Court: That is the only way it could affect trade and commerce, would be in the shipment of films and the licensing of films?

Mr. Wright: Yes, but that is sufficient, that is all that the Act requires.

The Court: Don't you think the first thing for you to do is to show that there was a monopoly in the licensing of films. We may spend two or three weeks here proving that they had a monopoly in the exhibition of pictures, and yet not prove a monopoly in the licensing of films.

Mr. Wright: That is the only way, that is the way a violation occurs, by acquiring a monopoly in the control and ownership of theaters. That is the only way in which an exhibitor can acquire a monopoly in the licensing of films.

Mr. Dobey: May it please the Court, if the defendants monopolized the exhibition of pictures in any manner in these towns where they operate, they finally monopolize the licensing of films in interstate commerce in that area and [fol. 636] in one of our anti trust cases, the Supreme Court said they must be responsible for the necessary consequences of their acts and we submit that the necessary consequences of their monopolization of the exhibition of films in any area in this territory, is the monopolization of the licensing of films in interstate commerce. Of course, the fact that it is a buying monopoly instead of a selling monopoly is absolutely immaterial because the Act says it is a violation if it results in an interference with trade and commerce in interstate commerce, and the licensing of films

is trade and commerce in interstate commerce between the states.

Mr. Frolich: May I point out that in this case, the Government is accusing Mr. Sudekum of having a monopoly down here because he owns a number of theaters. Mr. Wright has given you a theory just the opposite of the theory of the Government in the cases of the 5 major companies who were allowed to hold 2500 or 3,000 theaters, a great many more than Mr. Sudekum owns, and if that is his theory, I would like for him to state why the Government did not stop the 5 major companies from owning 3,000 theaters.

[fol. 637] The Court: I see I shouldn't have started this. Do you contend that because a man owns one picture show in two or three small towns where there are no other theaters, he is interfering with trade and commerce between the states?

Mr. Dobey: The fact that a man owns the only theater in the town, and that he has a monopoly of licensing films for that one theater in that community is not a violation of the Sherman Act. The question is, is it an unreasonable monopoly?

The Court: Isn't that a question of intent?

Mr. Dobey: It is a question of intent, as well as the manner in which the monopoly was acquired and the circumstances leading up to the acquisition of the monopoly. And on the question of reasonableness, of course, the method in which the monopoly was acquired is material, whether he acquired it by threats, or by intimidation, or by coercion.

The Court: The point I was making, it is an apparent monopoly.

Mr. Dobey: As we go about in these particular towns where we have closed towns, we have to consider the monopoly as we go along.

The Court: If you prove a man bought a 25 per cent interest in a business, and what he paid for it or to show that [fol. 638] he was forced out, unless that interfered with trade and commerce in some way, I don't see how it is a violation of the Act.

Mr. Dobey: It might affect trade and commerce because the closed one goes out of business and the remaining exhibitor has a monopoly in licensing films in that community by forcing the man out of business by coercion. The

method by which the monopoly was acquired and whether the monopoly is unreasonable, which is a violation of the Sherman Act.

The Court: All right, proceed.

Mr. Wright: Read the question.

The Court: The question was, how much he paid for this 25 per cent interest in those theaters?

A. $18,750.00.

The Court: Let me ask a question right there. Were they the theaters that you sold, two of them to Mr. Sudekum, and six others, a 50 per cent interest in.

A. Yes sir.

Mr. Wright:

Q. Isn't that contrary to what you testified? I thought you said the 25 per cent interest you acquired was limited to the theaters at Maryville, and Greenville, and Sweet-[fol. 639] water, that you had bought a half interest in some of the other theaters?

A. In one more, in Erwin, Tennessee, I had a half interest there.

Q. Just which were the theaters that you paid the $18,750.00 for 25 per cent interest in?

A. There was two theaters; one in Sweetwater, one in Lenoir City, two in La Follette, two in Greenville, and one in Maryville.

Q. And at that time you already had a half interest in the two at Erwin?

A. Yes.

Q. Now, in the deal that was made for the taking over of the theaters at Maryville and Greenville, by Mr. Sudekum, what part of the money that was paid for them did you receive?

A. Well, I don't know just how that was handled. We paid most of it out in debts. I don't recall just how it was divided.

Q. I am not asking you how it was paid out by you, I want to know how much you got, whether it was in the form of a discharge of debts for you or any other consideration?

The Court: What proportion of the $18,750.00?

A. Well, I don't recall. Parrott & Hendren Amusement Company, the Ausmns & Hendren Amusement Company,

they were interlocked, in a way that the money had to be divided; I just don't recall what the share of each party was.

Q. Have you got any record to show what each share was?

[fol. 640] A. No. I have not.

Q. Was Mr. Gorman keeping the books for you at that time?

A. Yes, sir.

Q. Do you think he would know what your share was?

A. No sir, Mr. Gorman didn't handle that transaction.

Q. Now, the Cherokee Amusements Inc., of which you are Secretary and Treasurer, was organized for the purpose of taking title to the theaters that you have mentioned, at Edwin, La Follette, Lenoir City, Sweetwater, isn't that correct.

A. Yes.

Q. The capital of that corporation was $50,000.00, was it not?

A. Yes, sir,

Q. 500 shares of $100.00 each?

A. Yes, sir.

Q. How were those shares issued?

A. Issued 25 shares to W. H. Parrish, 49 shares to K. C. Stengel, 1 share to Mrs. Stengel and 25 shares to myself,—I mean 125 shares.

Q. What was the consideration that was put into the corporation in consideration for those shares?

A. I don't recall.

Q. Have you got any record that would show that?

A. I don't believe we have.

Q. Can you find out?

[fol. 641] A. I could investigate it, yes.

Q. Will you do that?

A. Yes, sir.

Q. Do you have any idea whether, or what you may have contributed to the corporation for the shares that were issued to you?

A. Well, I owned 25 per cent interest in it, in the old corporation.

Q: Yes, but the three of the theaters in the old Parrott & Hendren Amusement Company had already been transferred to the Crescent Amusement Company, had they not?

A. Yes, sir.

Q. So that those didn't come into the Cherokee Amusement Company?

A. No.

Q. Do you remember what you did put into the Cherokee Amusement Company?

A. We put the assets of Lenoir City, Sweetwater, La Follette and Erwin.

Q. When you say "we", you are referring to you and Mr. Parrott?

A. Yes, sir.

Q. What did Mr. Stengel put in for the stock that was issued to him?

A. The stock that was issued to him was $25,000.00 that we received in consideration for that stock.

[fol. 642] Q. That $25,000.00 that you are referring to now, who paid that?

A. That is the $25,000.00 we received at the time we sold the 50 per cent interest in the theaters to Mr. Stengel, Greenville, and Maryville theaters, to Mr. Sudekum.

Q. Well, $17,500.00 of that $25,000.00 was paid for the theaters at Maryville and Greenville, that went into the Crescent Amusement Company, did it not?

A. I don't know. All I know, we received $25,000.00. How that was divided up between Mr. Sudekum and Mr. Stengel's companies, I don't know.

[fol. 643] Q. Do you know that that was all that they paid both for the theatre at Greenville and the one at Maryville that went to the Crescent Amusement Company?

A. All we got was $25,000.00.

Q. And the fifty per cent interest of stock that was issued Mr. Stengel? And that $25,000.00 was paid by Mr. Sudekum, was it not?

Mr. Armistead: May it please the Court, I haven't objected to the last few or numerous questions but I respectfully submit that this is absolutely immaterial and I object to any further questions about this. Now, we do admit that the Crescent Amusement Company has a number of affiliates and that Mr. Sudekum is the head of the Crescent Amusement Company. We submitted a stipulation to counsel

which, I think, will save all sorts of time. I am objecting to any further questions about the consideration that he received or who paid it and how it was paid for.

Objection overruled.

Mr. Wright: Will you read the question?

(Question read as follows: And that $25,000.00 was paid by Mr. Sudekum, was it not?)

A. I don't recall who paid the money. We got a check. I believe Mr. Sudekum's name was on the check, or one of them.

[fol. 644] Q. Wasn't part of that $25,000.00 paid over a period of time?

A. Yes, sir.

Q. $7500.00, wasn't it?

A. I don't know but there was some sum paid in thirty and sixty days, I believe.

Q. Wasn't it longer than that?

A. No.

Q. Wasn't there $7500.00 that was paid over a period of a year or two?

A. No.

Q. At the time you made the arrangement to sell the theatres to Mr. Sudekum and organize Cherokee Amusements, Inc., did you make any arrangement with Mr. Sudekum to pay him a salary or any income from the Cherokee operations?

A. Yes, sir.

Q. What was that arrangement?

A. Well, it was an arrangement where we paid him a salary for his advice, suggestions, counsel and things of that kind.

Q. That was part of the deal for taking over the theatres?

A. No, that wasn't the consideration. That was arrived at later.

Q. When was that arrived at?

A. Oh, I guess two months after that deal was made.

Q. You mean about two months after your theatres were [fol. 645] transferred to Crescent—that was in about June, 1936, wasn't it?

A. No, I think it was in August.

Q. And the Cherokee Amusements, Inc., was organized in October, 1936, was it not?

A. No, in August.

Q. Well, the arrangement that you made with Mr. Sudekum was made prior to the time of the incorporation of Cherokee Amusements, wasn't it?

A. Yes.

Q. Who made that arrangement?

A. The arrangement for Mr. Sudekum's——

Q. ——compensation?

A. Well, Mr. Parrott and I discussed it and the directors of the company met and passed it.

Q. Who suggested it?

A. Well, I believe I did.

Q. Had you previously discussed it with Mr. Sudekum?

A. No, I don't recall.

Q. You and Mr. Parrott just decided you wanted to give him some additional money on the deal?

A. We wanted to pay him for his services.

Q. And what services was it you wanted to pay him for?

A. Well, wanted to pay him for counsel, advice—we wanted to have the benefit of his experience and suggestions [fol. 646] and so on.

Q. Suggestions with respect to what?

A. Well, suggestions as to the best operation of the theatres, exploitation, policy and so on.

Q. Did you expect to get any assistance from him in connection with the purchase of films?

A. No.

Q. You had an understanding with him that he would have nothing to do with film buys?

A. No, we didn't have any special understanding about it.

Q. Isn't that one way in which Mr. Sudekum would be of very substantial assistance to the Cherokee Company?

A. No.

Q. He couldn't give you any help at all in licensing films?

A. Well, he never has.

Q. His experience in licensing films was of no value to you, is that right?

A. Well, we were getting films at reasonable prices.

Q. You got them at much more reasonable prices after Cherokee Amusements, Inc., was organized, didn't you?

A. No, I don't believe we did.

Q. You had been buying films for those theatres that were involved in this Cherokee deal prior to the time the corporation was organized, hadn't you?

[fol. 647] A. Yes.

Q. And after it was organized who then bought the films for the same theatres?

A. I did.

Q. For how long?

A. Oh, I guess it was about eighteen months or two years.

Q. That would be true for the year 1938?

A. No, I believe it was true, probably true for the year 1937; probably up until the middle of 1938. I am not sure about that.

Q. Well, if Mr. Stengel, if it appears that Mr. Stengel had testified he took over the buying in 1937 that is probably correct, isn't it?

A. That is probably so, yes, sir.

Q. And did he receive any compensation from the Cherokee Company?

A. No, sir.

Q. He became an officer in the organization?

A. Yes, sir.

Q. What were his duties with the company?

A. He was vice president.

Q. Did he do anything else besides license films?

A. Not until he took over the buying.

Q. Well, after he took over the buying did he do anything else?

[fol. 648] A. He later took over the bookkeeping.

Q. When was that?

A. That was in the fall of 1938.

Q. How much was this compensation you arranged to pay Mr. Sudekum when the corporation was organized?

A. I believe it was right after the organization—I believe it was $50.00 a week.

Q. As a matter of fact, it was $200.00, wasn't it?

A. $200.00 a week?

Q. Yes.

A. No.

Q. You say positively you never paid Mr. Sudekum $200.00 a week?

A. We didn't at the time you are speaking of.

Q. Well, when was it that you did?

A. I think we started that in 1940.

Q. It could have been a year or two earlier, couldn't it?

A. It could have been but I don't recall whether it was or not.

Q. Who disbursed the payments to Mr. Sudekum?

A. Mr. Gorman.

Q. He was the auditor of the Cherokee Amusement Company?

A. He was the bookkeeper.

Q. His memory on that question would be better than yours, would it not?

[fol. 649] The Court: Well, the books would be better.

Mr. Wright:

Q. Have you got the books that show what was paid to him?

A. No, I don't have any books with me.

Q. Well, you have got—have you got any; any in existence?

A. Yes, we have books.

Q. Can you produce those?

A. Yes, sir.

Mr. Armistead: Just a minute. We object to the production of those books. That is the internal affairs of this corporation. It doesn't throw any light whatsoever on the issue involved in this case, what they paid Sudekum or what they paid any officer or what they paid any employe.

The Court: Well, what is the purpose of the testimony, Mr. Wright?

Mr. Wright: The purpose of the testimony is to show that the deal that was made here was in order to get the benefit of Mr. Sudekum's film-buying power. That is why he received $200.00 a week, and Mr. Stengel took over the film-buying duties.

[fol. 650] The Court: The film-buying power was the Crescent Amusement Company, and not Mr. Sudekum personally, was it not?

Mr. Wright: Well, I don't think there is a great deal of difference between them as the company was operated. We have charged here that Mr. Sudekum, Mr. Stengel, Crescent Amusement Company and the Rockwood Company combined with each other for the purpose of monopolizing films, and we allege that they were able to do so by combining the film-buying power of each other into one circuit, which circuit, we say, has film-buying power so large and has used it in such a way as to be illegal itself under the Sherman Act.

The Court: What is that so I might understand what is the Government's theory on that? In what way did they use it that is illegal? Getting the films at a lower price?

Mr. Wright: To not only receive discriminatory treatment as between theatres which they operate and local independent operators. That involves not only films. It also involves clearance, discrimination and every known form of discrimination and actually taking films away from inde- [fol. 651] pendent competitors in order to put them out of business. The basis on which they are able to do that is the fundamental power that they have which enables them to control all of these situations that they have and to expand into others as they have been able to do, and eliminate competition from the fact that they have built up a pattern of theatre control by which they can control the film supply in those situations.

The Court: All right. I overrule the objection.

We will have a short recess at this time.

(Recess).

[fol. 652] Resumption after Recess.

The Court: Mr. Wright, did I understand you to say that Mr. Stengel made the film purchases for the Cherokee Amusement Company after Mr. Hendren ceased in that capacity?

Mr. Wright: Yes.

The Court: Then, if Mr. Stengel made the purchases, how would evidence of what Mr. Sudekum drew from the corporation as salary be competent if he didn't make the purchases?

Mr. Wright: I think that might be inferred from the way the deal was handled, that the payments made to Sudekum were actually made in return for *for* Mr. Stengel's services in helping in the film deal.

The Court: How is that? I didn't get that.

Mr. Wright: I think it could be inferred from the manner in which the deal was handled that the payments made to Sudekum were actually being made in return for Mr. [fol. 653] Stengel's services for helping in the film deal: you will remember there was evidence way back with reference to both the Crescent Company and the Rockwood Company.

The Court: What about the Cherokee?

Mr. Wright: Cherokee, and all of Cherokee's subsidiaries; and we propose to show that this company, which had ostensible independence, actually was combined with the Crescent Company and all its affiliates for the purpose of securing film control and of all the situations where they operated.

The Court: Well, granting what you say is true: granting that Mr. Sudekum did make film purchases in connection with Mr. Stengel for the Cherokee Company: what difference does it make how much he got out of it?

Mr Wright: The purpose of showing how much he got was to actually show the cost of this acquisition was nil, that he got more salary than he actually put into the Cherokee Company.

[fol. 654] The Court: Do you propose to show, to prove, that Mr. Sudekum individually was the purchaser of an interest in the Cherokee Company, Cherokee Amusement Company, or that that interest was purchased by the Crescent Company?

Mr. Wright: We do not think it is material whether it was held by the Crescent Company or Mr. Sudekum.

The Court: It might be very material if if were two distinct interests.

Mr. Wright: The interest that was given to Mr. Stengel, we expect to show, was held for Mr. Sudekum, or the Crescent Amusement Company; I do not think we are in position to show which as between those two.

The Court: I don't quite understand you; I am sorry.

Mr. Wright: I say the purpose of our proof is to show that the transfer of the half interest to Mr. Stengel was in reality for the benefit of either Mr. Sudekum or the Crescent Company; he put up the money, and that Mr. [fol. 655] Stengel was merely acting as a dummy for that proposition.

The Court: Was the stock in Mr. Sudekum's name?

Mr. Wright: Yes, sir.

The Court: Who do you contend put up the money?

Mr. Wright: Mr. Sudekum.

I asked him; he doesn't seem to know. I don't know whether Mr. Sudekum or the Crescent Amusement Company did. We expect to show one or the other did.

[fol. 656] The Court: I do not see that it is very material about the salary paid Mr. Sudekum.

Mr. Wright: I think it fits very completely into the picture as a whole, that there was an attempt made to trade with the Rockwood Company for licensing films, had nothing to do with Mr. Sudekum.

The Court: And you are not speaking about the Rockwood Company. We are speaking about the Cherokee.

Mr. Wright: The Cherokee too.

The Court: Who does the Government contend bought the films for Cherokee?

Mr. Wright: The films were collectively negotiated for by the companies in which Mr. Sudekum was interested—the Crescent, Rockwood, Cherokee, the whole group, not only the companies that were subsidiaries of Rockwood, but the company they had charge of the companies owned ostensibly with Rockwood; what their relations were, we [fol. 657] have alleged they combined together for this purpose, and it is denied by the answers and the stipulations offered show, they say Rockwood Company is owned by Mr. Stengle and Mr. Sudekum, and Mr. Stengel is Mr. Sudekum's son-in-law, that they were the licensing as much or more than that.

The Court: I understood you to say that Mr. Stengel bought the films for the Cherokee Amusement Company, and that the stock belonged to them, and Mr. Sudekum was paid two hundred dollars a month for his ability to buy the films.

Mr. Wright: That actually what they were getting, Stengel had only been in the film business for a period of about one year, and his ability was nothing compared to Mr. Hendren, but what they were buying and what they got in having Mr. Sudekum assume the film buying was that they were getting Mr. Stengel ostensibly to do the buying, but they were to get the Crescent's and Mr. Sudekum's buying power. I think, if the Court please, if I may ask him a few more questions.

The Court: All right.

Mr. Wright:

[fol. 658] Q. Why did Mr. Hendren turn over the negotiations to Mr. Stengel?

A. I didn't have time to handle it, we were building a theater over in Spruce Pine, I didn't have time to look after that and other business and buy the films.

Q. As a matter of fact, he assumed that quite a while before you built the theater in Spruce Pine, did he not?

A. No, we started to build that theater along in the middle of 1937, may be a little earlier.

Q. You say you started building the theater at Spruce Pine the middle of 1937?

A. Yes.

Q. Didn't you open it in the fall of 1938?

A. No.

Q. You had always found time to do the film buying for the circuit before that, hadn't you, or you had also done the acquiring of some films?

A. I had found or taken the time to do it but had to leave other things suffering.

Q. How much experience had you had in buying films?

A. I have been buying films for quite a number of years.

Q. How much experience did Mr. Stengel have?

A. Oh I don't know.

[fol. 659] Q. Didn't you have any idea at the time you turned the film buying over to him, whether he knew anything about it or not?

A. He evidently knew something about it, I don't know the number of years he had bought films.

Q. As a mater of fact, he had been in the film business only two years, hadn't he?

A. I don't know.

Q. Didn't you know that at the time he assumed the buying of films?

A. No, sir.

Q. When was it you first met him?

A. We met him when he came over to Greenville with Mr. Sudekum.

Q. When was that?

A. Well that was about the middle of 1936.

Q. When was the decision made to have Mr. Stengel take over the film buying?

A. I do not remember the exact date.

Q. Who did you discuss it with before you decided?

A. I discussed it with Mr. Stengel.

Q. Anybody else?

A. Mr. Parrott.

Q. You discussed it with Mr. Sudekum?

A. No.

[fol. 660] Q. Now, during this period you were paying Mr. Sudekum a salary, what if any discussion did you have with him about the business?

A. Well we discussed ways and means of improving our theaters and booking pictures, presenting the programs, exploiting them, changing the program per week, various things in connection with the operation.

Q. Did you also discuss the licensing of films for the circuit?

A. No, sir.

Q. How is it and why was it you discussed everything but that?

A. I had been able to take care of that satisfactorily up until Mr. Stengel took it over.

Q. That is the date Mr. Sudekum was receiving the salary was after Mr. Stengel took it over, was it not?

A. Yes.

Q. And why was it you discussed everything about the business with Mr. Sudekum except the licensing of the films?

A. I discussed with him occasionally, I hardly ever saw Mr. Sudekum, I talked to him on the telephone, and we discussed the merits of the films, and so forth, but nothing but just as to what we should buy and what we should show.

[fol. 661] Q. How often did you talk to him on the telephone?

A. Every time I needed any information, needed any help myself.

Q. And that was information about how many changes a week to make?

A. Well there is a whole lot of things: equipment, seats and machines.

Q. Did you ever talk to him about acquiring theaters?

A. Yes, I have discussed that with him.

Q. Did you talk to him in connection with acquiring the interest in the Newport Amusement Company?

A. Yes, sir.

Q. What if anything did you have to do with that?

A. Well I didn't have—Well I helped negotiate the deal.

Q. Who else negotiated it with you?

A. Mr. Parrott.

Q. Did you discuss it with Mr. Sudekum?

A. Sir?

Q. Did you discuss it with Mr. Sudekum?

A. Yes, sir.

Q. As a matter of fact he approved it before he made it, did he not?

Q. He approved—how was that?

Q. He approved the terms of the deal did he not, before [fol. 662] it was made?

A. After some discussion, yes, he said he thought it would be all right.

Q. How did you happen to buy the other theater or interest in that theater at Newport?

A. Well Mr. Baird was wanting, he knew we were getting along pretty well, and he wanted to make a deal with us.

Q. He came to see you first?

A. I am not sure about that.

Q. When was the first time you talked to him?

A. I believe it was in 1937.

Q. Whereabouts?

A. He called Mr. Parrott and asked if we could meet him in Knoxville.

Q. Did you meet him there?

A. Yes, sir.

Q. Was anybody else present?

A. No.

Q. What was the conversation you had there?

A. Well we just talked about the theater business and the advisability of getting together, and he said he would like to work out something with us, and I discussed it, and we all discussed it pro and con, and finally arrived at a price and made the deal.

[fol. 663] Q. Was anything said to him about you coming in there with an opposition theater, if you did not make a deal with him?

A. I do not recall.

Q. Do you recall whether you had investigated putting a theater in there, in Newport, in opposition?

A. No, nothing that I recall.

Q. And discussed it at that time with him?

A. No.

Q. The Newport Amusement Company was formed to take over the theater that you owned, was it not?

A. Yes.

Q. And that had a capital of ten thousand dollars?

A. Yes, sir.

Q. After the stock was issued to him, how much of the other stock was issued, how was the other half of the stock issued?

A. To Cherokee Amusement Company.

Q. And then who took over the film buying for Newport?

A. No one, Mr. Baird continued to buy.

Q. How long?

A. He is still buying part of those films, Mr. Stengel I think handles some of the contracts.

Q. Mr. Stengel handles the more important ones, does he not?

A. They are all important.

Q. He handles most of them, does he not?

[fol. 664] A. Yes.

Q. And does he receive any compensation for that?

A. Yes.

Q. And you received compensation for the Newport too?

A. Yes, sir.

Q. And Mr. Parrott also?

A. Yes, sir.

Q. What services do you and Mr. Parrott render?

A. Well, we are officers of the company.

Q. What office do you hold?

A. I am vice-president.

Q. What is Mr. Parrott—

A. I beg your pardon, I am secretary and Treasurer. Mr. Parrott is vice-president.

Q. What do you do for the Newport Company?

A. Well, we, Mr. Baird, Mr. Parrott and I get together and discuss business, visit with each other on business.

Q. Do you recall what the consideration that was paid by Cherokee for the half interest in Newport?

A. Five thousand dollars.

Q. How much of that was paid in cash?

A. Cash?

Q. At the time of the sale?

Q. Yes.

[fol. 665] A. It was put up by the company.

Q. It was put up by the company?

A. Yes.

Q. And you are quite sure it was not spread out over a period of time?

A. No.

[fol. 666] Q. Have you got a record which shows that?

A. I think we should have.

Q. In the subpoena that was served on you, you were asked to produce all records which related to the acquisition of any theafers in that town by your Company, were you not?

A. Yes.

Mr. Waller: That is a corporation, Newport Amusement Company. I understand it is not an acquisition of a theater, but it is acquisition of an interest in a corporation.

Mr. Armistead: I think, further, evidence has been furnished heretofore to the Government, that those records were kept in the Nashville Office of the Crescent Amusement Company and we haven't got them.

Mr. Wright:

Q. Is that right, Mr. Stengel has got those records?

A. Yes.

Q. How long has he been keeping them?

A. Ever since the Fall of 1938.

Q. Why were they turned over to him then?

A. Well, we thought that he could handle them better, keep a better record.

Q. Now, as a matter of fact, you, Mr. Parrott and Mr. Stengel received more than the $5,000.00 you paid for the half interest in the Newport Amusement Company during [fol. 667] the first year of its operation, didn't you, in the form of salary?

Mr. Armistead: We object to that on the ground that it is immaterial.

The Court: Objection sustained.

Mr. Wright: If the Court please, I think we are entitled to show that in acquiring these theaters that it was practically at no cost to them, whether they had someone to give them the stock or agreed to pay for the stock, they took it all back in salaries.

The Court: Suppose they had lost money, it wouldn't be a different proposition just because they happened to make a good trade; I don't see anything wrong with that.

Mr. Wright: I think we are entitled to show just how good this trade was that they made.

The Court: Sustain the objection.

Mr. Wright: After all, these defendants are the people who are on trial here and some of the complaining witnesses, by Counsel for the Defense, were permitted to show how good the business was and how much money they made, and it seems to me that we are clearly entitled to show these deals we have alleged have been coercive, and to show exactly what benefits received by the parties that we allege combined together to make these acquisitions.

And, if we can't show that——

[fol. 668] The Court: It might have been received for many different reasons.

Mr. Wright: That is a matter to be inferred from the testimony, from all the evidence that goes in the record. I don't know how we can make a case of combination and conspiracy between the various groups of exhibitor defendants in the case unless we are allowed to develop fully the relations between them and what they got out of the acquisitions that we have alleged to have been made coercively.

The Court: I have ruled.

Mr. Wright:

Q. Do you know whether, after Mr. Stengel took over the film buying for the Cherokee Company and the subsidiaries, whether the film costs of the theaters that were operated by them went down?

A. I don't recall that they did.

Q. Do you know whether they did *not* not?

A. I am not positive one way or the other.

Q. Wasn't that one of the things that you were interested in as a partner in that business?

A. We were interested in low film rentals; we were mostly interested in them buying the films and get the burden off of me.

Q. That has a good deal to do with the success or failure of the operations, doesn't it?

[fol. 669] A. The price of films?

Q. The price of films.

A. Yes.

Q. And particularly the percentage of the gross business that you take in that you had to disburse in film cost, isn't that right?

A. Yes sir.

Q. Don't you know, as a matter of fact, that after Mr. Stengel took over the film buying that the percentage of gross which went into films was substantially reduced?

A. It probably was but I never have taken a check, I don't know.

Q. And if it appears from other evidence that it was, can you give us any explanation of that fact?

A. No, unless he is a better bargainor than I was.

Q. What would make him a better bargainor?

A. Well, patience with those film salesmen.

Q. Wouldn't the fact that he was able to negotiate at the same time for a group of 60 or 70 theaters instead of 6, have something to do with it?

A. I don't know anything except about Cherokee.

Q. You have been in the film business long enough to know the answer to that question, haven't you?

A. No, I wouldn't say that 60 theaters did better than one.

Q. When you used to operate theaters and buy the films for them, how did you buy? Did you buy them all at once? [fol. 670] A. No, we bought selective contracts, and bought them with cancellation provision, just anyway that we wanted them.

Q. I am not referring to all the films of a particular Company, I am referring to all of the towns in which you operated; you generally made——

A. Yes, as a rule.

Q. In the cities where you had—Maryville and Greenville were the only ones, those towns, in which you had competition?

A. We had competition in Lenoir City.

Q. When was that?

A. That was in 1934-1935, and 1936.

Q. During the 1934-1935 season, the only competition you had was in Greenville and Maryville, was it not?

A. In 1936, did you say?

Q. 1934-1935 season, film season?

A. No, we had it in Lenoir City.

Q. Did you have it during that year?

A. I believe it developed in 1935 and went into 1936.

Q. At the time you were buying films for the 1934-1935 season for all of your situations, the only two in which

there was competition, were Greenville, and Maryville, isn't that right?

A. Yes sir.

Q. Do you recall telling any of the film offices that unless you could get the films in Greenville and Maryville, where you needed them, you were not going to buy their films in the four closed situations that you controlled?

[fol. 671] A. Yes sir.

Q. And that is the customary manner in which you negotiated for films for one group of theaters, where you have any competitor and some closed situations?

Mr. Waller: I object. The witness said he only knew about Cherokee, and he is asking him the general custom.

The Court: What is the customary manner of negotiating for them in a group, is that what you mean?

Mr. Waller: That was not the question he asked. He asked him if it wasn't customary for a man that was buying films to tell the film office if he didn't sell him films in the town where he had opposition he wouldn't buy them anywhere. He is asking this witness the general custom in the industry.

Mr. Wright: He has been in the business a long time.

The Court: Do you know anything about that?

A. That was my method, I don't know what the others were.

The Court: I guess they all made the best trade they could.

Mr. Wright:

Q. As a matter of fact, in the Greenville situation, some of the films, which you had been accustomed to buy before Mr. Sudekum and the Crescent opened the theater in Greenville, were sold away from you, to the Crescent house, weren't they?

A. They bought them, yes.

[fol. 672] Q. That you had been frequently buying?

A. May be some before I had been buying.

Q. What companies are those that you refer to?

A. I don't know. I don't remember whose I was using; Metro—I believe and Vitagraph.

Q. United Artists?

A. I don't recall whether I used United Artists or not.

Q. Do you remember whether you were given an opportunity to negotiate for the purchase or the licensing of films from those companies for use in your theaters in Lenoir City and Greenville before they were sold away from you to the Crescent House there?

A. Yes.

Q. You were?

A. Yes sir.

Q. You didn't want to buy those films?

A. Had all I needed.

Q. Did you ever make any complaint or statement to any salesman of any film company that they had sold away from you at Greenville to the Crescent?

A. Yes sir.

Q. Were those statements untrue that you made?

A. I made those statements in order to force them down in price in other towns, I wanted to make them think that just because they didn't sell us for all the towns, I wasn't going to buy them unless they made me a good price in other towns.

[fol. 673] Q. Statements that they were selling away from you is something that you can't very well bluff about, isn't it? It is either true or it *is* isn't true is that right?

A. That is right. But I made the statement to the salesmen for the reason to lead them off and to think if they didn't sell me for all the towns I wouldn't buy them for any town, when I would get them the way I wanted them——

Q. If they had been selling them away from you, how would your telling them that they had sold away from you cause them to believe that they had?

Mr. Waller: I think the term "selling away" ought to be defined.

The Court: Well, that is argument anyway.

Mr. Waller: In other words, it is just a question of whether this man was a regular customer or whether he had bought films that year. He said some companies from whom he had bought films in the past years may have sold the Crescent Amusement Company.

Mr. Raftery: I am going to object to the form of the last question unless he makes it in understandable English. I don't know what it means.

[fol. 674] Question read by the reporter.

Mr. Raftery: I renew the objection after that.

The Court: Suppose you reframe your question.

By Mr. Wright:

Q. Did you negotiate with the representative of the Vitagraph Company for the exhibition of his 1934-1935 feature pictures for exhibition in your theater at Greenville, in your theater?

A. No.

Mr. Raftery: I think it is on us to explain that Vitagraph—this is the first time it has been mentioned in the trial—is the selling agent for one of the Big Five, Warner Brothers.

Mr. Wright: That is correct. We pointed that out in the trial brief that we filed.

The Court: I haven't had time to read it. Go ahead.

By Mr. Wright:

Q. Did you try to negotiate with them?

A. I don't recall that I did.

Q. Do you recall whether you made application for their films that year?

[fol. 675] A. I may have but I don't recall whether I did or not.

Q. Well, who were those salesmen you talked to and told they were selling away from you?

A. I think Mr. Bryan was the Warner Brothers salesman.

By the Court:

Q. What do you mean by selling away from you? I don't quite understand that myself.

A. I suppose he means that they don't sell me and they sell Mr. Sudekum.

Mr. Raftery: That is a new term that came into the industry since these lawsuits started.

Mr. Wright: Nothing new in them.

Mr. Raftery: The contracts have expired. Let's assume that I run a theater and the contract with Warner Bros. is that I play fifty-two pictures and I finish with them. The following year Warner Brothers may decide to

sell Mr. Mitchell. I have no right to their pictures. I have no contract; I have nothing, so the Government——

The Court: Just didn't renew the contract?

Mr. Raftery: That is all, and the Government calls that selling away.

[fol. 676] By Mr. Wright:

Q. The term "selling away" is one that is used in the trade, is it not?

A. They use a lot of terms in the trade.

Q. And it has been in the trade ever since you can remember?

A. I beg your pardon.

Q. I say, the term has been in the trade ever since you can remember?

A. I have heard it, yes.

Q. Does the term mean what Mr. Raftery stated it meant or does it mean what you said it meant?

A. It means what Mr. Raftery said.

Q. Maybe we had better let Mr. Raftery testify for us. Now, who else was it you talked to about it?

The Court: All you have to do is to give him an opportunity. (Laughter.)

By Mr. Wright:

Q. What other film representatives did you tell the same story to?

A. I don't recall whether I told it to anybody; I may have.

Q. United Artists' salesmen?

A. I believe I did tell it to the United Artists' salesman to get rid of him.

Q. And who was it you talked to?

[fol. 677] A. I believe it was Clarence Eisman.

Q. He was a salesman out of the Atlanta Exchange?

A. Yes sir.

Q. When did you talk to him?

A. I don't know; during that period.

Q. Didn't you tell him you wanted to buy United Artists' films for that season, 1934-1935 for Greenville?

A. I don't feel like answering questions I don't know exactly how to state.

Q. Well, a minute ago you were very anxious to tell me what you said, how you tried to get rid of them. If you don't remember, just say so and if you do, I would like to have your best recollection.

A. I don't remember what I said to them, but I remember trying to get rid of them.

Q. Do you remember saying to him ever at any time he had sold United Artists pictures away from you to Cresent for Greenville?

A. No.

Q. Did you talk to any salesman from Metro about a product for Greenville for the 1935-1936 season?

A. I don't remember.

Q. You don't remember whether you did or not?

A. No.

Q. Do you remember any negotiations at all with Metro [fol. 678] at that time?

A. I don't recall whether I did or not.

Q. What were Mr. Fred Gorman's duties with Cherokee besides keeping the books?

A. That was all—managing the theatre at Erwin.

Q. Anything else? Did he work on any theater acquisitions?

A. He assisted in them.

Q. What kind of assistance did he render?

A. Well, he would inform me at various times of theatres he heard could be bought and I would tell him to investigate it and see if they wanted to sell and he would usually do that and make report, contact the people and talk about it.

Q. Any instructions that he had with reference to theatre acquisitions came from you, is that right?

A. I occasionally gave him instructions. He used his own initiative a whole lot.

Q. Well, you were the only one in the Cherokee Company who gave him instructions in connection with theatre acquisitions, were you not?

A. Yes.

Q. Did you give him any specific instructions in connection with those acquisitions?

A. There is no specific instructions as to acquiring a theatre.

Q. Just told him to use his own judgment?

[fol. 679] A. Yes, sir.

Q. And any offers that were made by him were always subject to your approval, were they not?

A. Yes sir.

Q. You participated in the negotiations for the acquisition of the theatre at Spruce Pine, N. C. yourself, did you not?

A. Yes sir.

Q. After you made that acquisition what did you do with the equipment there?

A. We put it in storage and then moved it to various theatres where we needed it.

Q. Did you need the equipment particularly?

A. Yes sir.

Q. That equipment?

A. Needed equipment and that is equipment.

Q. When you made the purchase of the theatre why was it that you inserted a provision in the sales agreement that the seller would not compete with you for a period of ten years in the county?

A. Well, that is a practice that is used in a lot of businesses so I just inserted that clause.

Q. Do you always put that in all agreements that you make each time you take over a theatre?

A. No, I believe that is the only one.

[fol. 680] Q. You put the same provision in your agreement for the take-over at Copperhill, did you not?

Mr. Waller: I think that was Newport Amusements there.

A. Newport Amusements took over Copperhill.

By Mr. Wright:

Q. You were present at the time the final deal was made, weren't you?

A. I don't recall just what is in that lease.

Q. Was there any special reason why you took the agreement at Spruce Pine and didn't elsewhere?

A. No, special reason for the clause that got in there.

Q. You think it crept in by mistake?

A. No. We have different attorneys to draw up contracts and that was probably his way of drawing them. He thought that would be appropriate.

Q. Well, the principal thing you did that for at Spruce Pine was the assurance of freedom from competition, wasn't it?

A. No.

Q. You weren't interested in getting assurance of not having any competition there?

A. We'd rather not have a competitor but we didn't buy it for that reason.

Q. You can make a great deal more money in any situa- [fol. 681] tion if you don't have a competitor there, isn't that a fact?

A. Yes.

Q. If you don't have anybody to compete with you in licensing films for the situation you can license them cheaper, can you not?

A. That don't have a whole lot to do with it.

Q. You don't think it does?

A. No.

Q. What does determine the price you pay for films?

A. Bargaining.

Q. But the fact that you are the only bargainor on the buying side then when the bargain is made——

A. I wouldn't think so.

Q. In your experience of operating a circuit of theatres for Parrott & Hendren before you organized the Cherokee did you find that films in the closed situations cost you more than or less than those in competitive situations?

A. They were about the same. They didn't increase any. Our film rentals didn't increase.

Q. The percentage of gross you pay out in film rental is about the same in a closed situation as it is in a competitive situation?

A. It depends on the situation. I don't know just how you would answer that.

Q. Have you had enough experience to know that it costs [fol. 682] you more in a competitive situation?

A. They try to get more in any situation.

Q. But they can get more in a competitive situation, can't they?

A. No.

Q. Why not?

A. I wouldn't think so.

Q. Why not?

A. Well, it depends on the man that is buying the film, as to the amount he will agree to pay and if he doesn't agree to what they want him to pay, then he gets them for what

he wants to—now, that is usually true where there is competition.

Q. Well, it is true that if there is another operator to take the film, if the distributor gets his films exhibited there, whether that first one will take them or not, is that right?

A. No, I don't think that is right. It all depends on the man that is buying the film, his ability to pay and his bargaining.

Q. What gives that man buying or bargaining power?

A. Well, we call it a line of talk, one thing.

Q. Just a question of the best line of talk, gets the cheapest film, is that right?

[fol. 683] A. That has a lot to do with it.

Q. A man who has got one theatre and has got a line of talk can buy films just as cheaply as the man who has a hundred, is that right?

A. Yes. A line of talk—don't depend altogether on that but that helps him.

Q. What is that?

A. A line of talk don't govern the whole thing but the line of talk helps. Bargainors in independent houses can buy films if he knows how to buy, can bargain just — cheap as his competitor.

Q. Now, would that answer be the same if an analysis of rentals that were paid for films in situations involved in this case show that the cost of film to a circuit was substantially less than that of independents in comparable situations?

Mr. Waller: That is objected to. There is no such thing as a comparable situation.

The Court: The whole matter is very interesting but it seems to be a matter of argument.

Mr. Wright: I beg your pardon?

The Court: I say, the whole thing is very interesting but it seems to me to be a matter of argument.

[fol. 684] Mr. Wright: I won't pursue it any further then.

Q. Isn't it a fact that you can operate more profitably without competition than you can with competition?

A. Yes sir.

Mr. Waller: He has answered that affirmatively twice and I object to it as repetition.

By Mr. Wright:

Q. Don't you try, as a matter of policy, to acquire just as many non-competitive theatre situations as you can?

A. No.

Q. Why not?

A. We don't try to acquire any theatre.

Q. People try to sell them to you, is that right?

A. That is right.

Q. Well now, you are interested in buying situations where you can be assured you won't have competition, are you?

A. Well, where there is no competition it is more inviting.

Q. Is Mr. Fred Gorman still working for the Cherokee Company?

A. No.

Q. When did he leave?

A. He left in the winter of 1938.

Q. Do you know why he left?

A. Yes.

[fol. 685] Why was it?

A. Well, we didn't need him any longer.

Q. You discharged him?

A. Well, we wouldn't call it discharged, we asked him to resign.

The Court:

Q. And stopped his pay?

A. Yes sir.

By Mr. Wright:

Q. You hadn't needed him since June of 1938 when you sent the books into Nashville to Mr. Stengel, had you?

A. Well, we didn't need him for some time.

Q. Why had you kept him working for you?

A. Well, he was interested in acquiring some theatres of his own. He wanted to get out and branch out, he said, and be independent, and he was going to do that and just never did do it.

Q. When you asked him to resign did you tell him any reason for your decision?

A. Yes sir, there was a reason. Business wasn't so good at that time and Mr. Stengel was doing the bookkeeping

down in Nashville and he didn't have any duties other than looking after the theatre and the directors thought that it would be better if I went up to Erwin and took over the management of the theatre and do my booking and other duties there.

Q. Wasn't there another reason you asked him to resign?

A. No sir.

[fol. 686] Q. Isn't it a fact one of the reasons you asked him to resign was you had a theater at Hickman Kentucky that Mr. Sudekum was interested in?

A. No, sir.

Q. Did you ever discuss his resignation with Mr. Sudekum?

A. I think we did after he left.

Q. What was the discussion about that after he left?

A. Well, we told Mr. Sudekum that we were going to save the company some money, and that I was going up to Irvine, Kentucky and take over the theater there; and Mr. Sudekum said, Use your own judgment.

Q. That was before, wasn't it?

A. It was either before or after; I don't remember when it was.

Q. Did anybody ever tell you that he had been trying to buy a theater at Hickman, Kentucky?

A. I heard about a year after he left that he was.

Q. Who did you hear that from?

A. I don't recall; I believe it was Mr. Stengel.

Q. Did he say anything else about it?

A. That is all.

Q. Did you discuss the possibility of buying a theater there with him?

[fol. 687] A. At Hickman, Kentucky?

Q. Yes?

A. No, sir.

Q. Did you discuss with him the possibility of going into the theater business at any other location?

A. Yes, sir.

Q. What location?

A. Any location he wanted; he was after several, he had several in mind.

Q. What else did he tell you he had in mind?

A. He had Irvine, Kentucky, Copper Hill, Tennessee, and about 23 in Virginia, and one out in Kansas, and just all over the country he was investigating.

Q. What did he tell you about Copper Hill, Tennessee?

A. He said they wanted too much money.

Q. As a matter of fact, he investigated the theater there for the Cherokee Company, didn't he?

A. Prior to his own personal investigation he did.

Q. Did you tell him that the Cherokee Company wasn't interested in a theater there?

A. We wasn't interested at that time; Cherokee wasn't interested.

Q. Did you tell him that afterward?

A. Yes, I think we did; I am sure we did.

[fol. 688] Q. You are quite sure, are you, that either Mr. Sudekum or Mr. Stengel had spoken to you about Mr. Gorman's activities in connection with Hickman before he was discharged?

A. No, sir, I never heard of it until after he left.

Q. I would like to have this letter, dated October 9, 1936, from Fred Gorman to Mr. Hendren marked as Government's Exhibit No. 28, for indentification. (So marked by the Clerk) I will hand you Government Exhibit No. 28, for indentification, and ask you if that is one of the documents you produced in response to the subpoena served upon you?

A. Yes, sir.

Q. And that matter was written and received by you on or about the date it bears, October 9, 1936?

A. Yes, sir.

Q. Do you recognize the signature as that of Fred Gorman?

Mr. Armistead: May I inquire at this time for what purpose the plaintiff is offering or intends to offer this letter?

Mr. Wright: To show that Mr. Hendren was wholly familiar with what Mr. Gorman was doing in the theatre acquisition.

[fol. 689] Mr. Armistead: He has already answered that he talked with Mr. Gorman about the efforts to acquire theaters.

Mr. Wright: I call your Honor's attention to the second to the last paragraph.

The Court: All right. I overule the objection.

Mr. Armistead: I would like to make this further observation or objection: It will be all right if a photostat is made of that letter; that is our letter, and we want to keep the original.

The Court: Yes.

Mr. Wright:

Q. Mr. Hendren, did you read the two subpoenas that were served upon you?

A. Yes, sir.

Q. I will call your attetnion to this paragraph one, which refers to "All memoranda, correspondence, and other written communications, whether inter-office or otherwise, with the exception of availability notices and notices of selection of play dates, written or received during the period between Januar- 1, 1934, and December 31, 1940, which [fol. 690] relate to the negotiation or performance of contracts for the exhibition of feature pictures released by the major film distributors" and which they have named in the subpoena, "in the following named towsn:" including the towns of Maryville, Tennessee, Greeneville, Tennessee, and the othe- towns in which you operated theaters. Now, did you make a search of your files to see if you could find any such correspondence or communications?

A. Yes, sir.

Q. And you were unable to find any?

A. Other than what I brought.

Q. The folder which you handed me contained no documents of that description; do you find anything in there that you could point out to me that answers the description contained in paragraph one?

A. I don't know; there are other designations mentioned in what I brought.

Q. Yes, but is there any data in there that answers the description in paragraph one?

A. No, I don't know that there is.

[fol. 691] Q. During this period that is specified in the subpoena, you had a considerable amount of correspondence with the major film distributors with reference to the subject matter there specified, did you not?

A. You mean did we receive correspondence from them?

Q. You sent and received?

A. Yes.

Q. What was done with that correspondence?

A. None of the correspondence pertained to that particular paragraph.

Q. I expect you misunderstood my previous question; I said isn't it a fact that you did have a considerable amount of correspondence with the major film distributors which related to their negotiations, confirmations of contracts with reference to pictures released by them in the towns in which you operated?

A. Yes.

Q. Which were sent and received during the period of January 1, 1934, to December 31, 1940?

A. We have had them; we did not keep those files.

Q. How long do you keep them?

A. Well some of it we do not keep them either, we destroy them when it comes in, others we might keep thirty or sixty days, average up about six months.

Q. What do you keep thirty or sixty days?

[fol. 692] A. Confirmations and things of that kind.

Q. Leave off the confirmations, those are expressly excluded from the paragraph. Anything else?

A. No, that is about all we get, all the rest of the correspondence.

Q. All the rest of the correspondence you destroy all that as you write it, or as you receive it?

A. No, if we get a letter from a booker asking to supply dates, or tell us where we are delinquent in some pictures, there is no use filing that away, and we pitch it in the waste basket.

Q. I am referring now to the correspondence asked for in the subpoena relating to the negotiations of contracts which excludes those, how about those letters you write, do you destroy those as they are written?

A. No, we keep them about six months, sometimes longer, sometimes a shorter period.

Q. There are none that you have kept longer than six months, is that right?

A. No.

Q. And would you answer the same, would your answer be the same with respect to documents called for in the paragraph two of the subpoena?

A. What is that?

[fol. 693] Q. All memoranda, correspondence or other written communications, whether inter-office or otherwise,

relating to clearance granted in favor of or against theaters located in any of the towns listed below, during one or more of the motion picture seasons, from January 1, 1934, to December 31, 1940, which relate to a refusal to negotiate for licensing of feature pictures, where the major film distributors are listed in paragraph one?

[fol. 694] A. That other answer applied to that, too.

Q. Would the same answer apply to Paragraph of the subpoena as follows:

> "3. "All memoranda, correspondence, and other written communications written to or received from the major film distributors or the defendant exhibitors during the period between January 1, 1934, and December 31, 1940, relating to admission price charged by theaters located in towns listed in Paragraph 1 hereof".

A. Yes sir, the same thing applies. I don't think we ever got any letters like that.

Q. Would the same answer apply to paragraph of the subpoena af follows:

> "4. "All memoranda, correspondence, and other written communications, whether interoffice or otherwise, written or received during the period between January 1, 1934 and December 31, 1940, relating to the purchase or leasing of theaters in the following towns:"

which includes Spruce Pine, North Carolina, Erwin, Tennessee, LaFollette, Tennessee, Maryville, Tennessee, Newport, Tennessee. You had something to do with the acquisition of those theaters in all of those towns; did you not?

A. Yes.

Q. Did you have the correspondence or memoranda which related to the purchase or leasing of theaters in all of them?

[fol. 695] A. You have got it there, that is all there was.

Q. The only one of the documents that you have produced related to Spruce Pine, North Carolina, isn't that correct?

A. That is the only one that I know of.

Q. Did you make a search for the others?

A. That is the only file we had.

Q. Do you ordinarily, did you have correspondence or memoranda of the other acquisitions?

Mr. Waller: The record already shows that the other acquisitions were already made before the subpoena and before the formation of the company.

Mr. Wright: It doesn't show anything of the sort, the subpoena is for January 1, 1934.

The Court: All right, adjourn court until 1:30.

(Recess 12:30 to 1:30 P. M.)

[fol. 696] Afternoon Session

The Court: Mr. Raftery, I have been thinking about your objection that was made yesterday on the question of agency, and possibly the Court was a little gratuituous in popping off on some of the matters. Of course, you stated the law correctly generally relative to the question of agency. However, I think that your remarks or objections would probably be more applicable if this were a case where the suit was against one of the distributing companies on a contract; I think there would be a difference in a case of that kind, and particularly in this case on account of the fact that the contract was accepted by the distributor, R. K. O.—No, Paramount. I think from the answer that the statements made by the salesman were within the apparent scope of his authority, and particularly when ratified by the branch office manager at Memphis. I just want to call that to your attention for the record, inasmuch as I made some statements that possibly might be misconstrued.

Mr. Raftery: Another reason, of course, Judge, in making [fol. 697] the objection was the absence of the Big Five from this lawsuit; and it seems that most of these gratuituous statements of salesmen, or you might say sales talk—I forget the exact language the witness used—the man who could talk the most was the best buyer or best seller; we were pressing the objection primarily because of the absence from this lawsuit; we don't want to have piled up here a long list of what Warner Brothers salesmen said, and what Fox salesmen said, and what Paramount salesmen said, and particularly when they have been released from the lawsuit.

The Court: Of course, they are still contended in the case as being co-conspirators, and naturally the conspir-

acy will have to be proven before these statements are competent.

Mr. Raftery: Or dismiss the order issued on behalf of the Government to produce these men here and let them state to the contrary.

The Court: Well, probably they will before the case is over. Proceed, Mr. Wright.

[fol. 698] Earl Hendren resumed the stand and testified further as follows:

By Mr. Wright:

Q. Mr. Hendren, in searching the records for the purpose of subpoena serving on you for the Cherokee Company, did you also search the records kept by Mr. Stengel here in Nashville?

A. No, sir.

Q. You don't know now what records answering the description in the subpoena might be here at Nashville?

A. No, sir, I wouldn't know exactly; as a matter of fact, I don't know just what is here.

Q. Will you undertake to find out at the office what there is here in Nashville that answers the description in the subpoena?

A. I guess I could.

Q. Are you willing to do that? Will you do it?

Mr. Armistead: I understand the law to be, your Honor, if a witness hasn't a record in his possession, it is not incumbent upon him to go somewhere and get it.

The Court: Well, if he was an officer of the company he would have access to the records.

[fol. 699] A. I will make every effort to get what you want.

Q. And you will examine all of the records of the Cherokee Amusement Company here at Nashville to see whether there are other records which you haven't produced which answer the description in the subpoena, that haven't been produced?

A. Yes, sir.

Q. Now, during the time that you operated the theaters at Maryville, Greeneville, Lenoir City, Sweetwater and

Erwin as Parrott and Hendren Amusement Company, did you keep any records of the profits earned by those theaters?

A. No; Mr. Gorman kept them.

Q. Well, they were kept for you by him?

A. Yes, sir.

Q. And have you kept any of those records?

A. Well, we kept them for a while and had them stored, these old records, prior to Cherokee, and we had them stored in Lafollette, and two or three years ago a fire up there in the theater destroyed everything we had in regard to records, files, and so on.

Q. So you have no records at all?

A. No, sir.

Q. As to the operating results of those theaters while you were operating for Parrott & Hendren?

[fol. 700] A. No, sir.

Q. Do you remember about that those theaters earned while they were being operated by Parrott & Hendren?

A. They didn't earn much of anything.

Q. How much is that?

A. Well, that is usually a loss.

Q. They were operated at a loss during what period?

A. Well, practically all the time.

Q. Were you operating at a loss in Greenville when you had no competition there?

A. Yes.

Q. And were you also operating at a loss in Maryville when you had no competition there?

A. We didn't operate in Maryville without any competition. We went into Maryville when Mr. Sudekum was already there; so we had competition; we never operated in Maryville without competition.

Q. Why was it that you were operating at a loss?

A. Well, the Depression was one thing; bad management was another; no equipment was another; and there were several reasons.

Q. You were just a thoroughly incompetent operator, is that it?

[fol. 701] A. Well, the film salesmen say I was if I couldn't pay any more for films than what they were asking, that I couldn't run a theater.

Q. Is that what you now say you were?

A. Well, I evidently was; I didn't make any money.

Cross-examination.

By Mr. Armistead for Defendant Crescent:

May it please the Court, in so far as the Crescent is concerned, we had understood that this witness had received a letter from Mr. Arnold's office in Washington to the effect that he should hold himself in readiness to appear as a witness beginning the week of the 14th, perhaps the 21st, and accordingly I made my plans to cross-examine other witnesses; and I would like the privilege of reserving the cross-examination of this witness until a future date.

The Court: Well, you can recall him at any time you want to.

Mr. Armistead: Yes, sir.

[fol. 702] F. M. PITTMAN, called as an adverse witness by the Plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

Mr. Bodey for the Plaintiff:

Q. Will you state your name and address, please, sir?
A. F. M. Pittman; Greeneville, Kentucky.
Q. What is your occupation?
A. Theater manager.
Q. For whom Rockwood Amusements.
—. ——.
Q. At Greenville?
A. Yes, sir.
Q. How long have you held that position?
A. Approximately three years.
Q. Now, prior to the time you became manager of the theater at Greeneville, Kentucky—is that the Crescent or Rockwood?
A. Rockwood.
Q. —What was your occupation?
A. I was theater manager.
Q. Where?
A. In Central City.
Q. For what company?
A. I was manager for Rockwood there for one year, approximately one year.

Q. Now, prior to the time you became manager—For [fol. 703] what theater was that?

A. That was the State Theater.

Q. Was that the theater formerly called the Selba Theater?

A. Formerly called the Selba Theater, yes, sir.

Q. Prior to the time you managed the Selba Theater, where were you?

A. I had a theater in Central City, Kentucky.

Q. What was the name of that theater?

A. The Empress Theater.

Q. How long did you operate that theater?

A. I operated it as an individual about six months.

Q. Prior to that time, were you connected with that particular theater?

A. Yes, in partnership with another party.

Q. Who was the other party?

A. Guy D. Martin.

Q. How long did you and Mr. Martin run the Empress?

A. Approximately 5 or 6 months.

Q. And during this period, what was the date when you and Mr. Martin began operating the Empress, approximately?

A. About around the first of 1937.

Q. That was when you began the operation of the Empress?

A. Yes, sir.

Q. Now, was the Empress being operated at that time? [fol. 704] A. The State, you mean?

Q. No, I mean the Empress; did you open up a new theater?

A. We opened the Empress Theater.

Q. How long had it been closed?

A. We remodeled it from a store room and made a theater out of it.

Q. Prior to the time you opened the Empress in the first part of 1937, what was your occupation?

A. I was Theater Manager for the Selba Amusement Company.

Q. And the Selba Amusement Company operated the Selba Theater at Central City?

A. Yes, sir.

Q. And how long had that theater been in operation?

A. Since 1921.

Q. Now, who were the people in charge of the Selba Theater?

A. You mean the principal stockholders?

Q. Yes?

A. Guy D. Martin, J. R. Martin and the heirs of A. J. Mercer.

Q. Now, when you opened the Empress were you the manager of that theater?

A. I was the Manager of the Selba, and I managed the Empress too, yes, sir.

[fol. 705] Q. Now, at the time you opened the Empress, did you and Mr. Martin open that theater in partnership?

A. Yes. Mr. Martin and I also had a lease on the Selba at that time; we were operating the Selba instead of the company.

Q. At the same time you began operating the Empress you were also operating the Selba Theater?

A. Yes, sir.

Q. In partnership with Mr. Martin?

A. Yes, sir.

Q. Now, at that time Mr. Martin was also one of the principal stockholders in the Selba?

A. Yes, sir.

Q. And you and Mr. Martin owned the Empress together?

A. That is right.

Q. Were both the theaters operated continously?

A. For a short time we operated them continuously; then we went to part time on the Empress.

Q. When did you go to part time on the Empress?

A. After it had been in operation about two months.

Q. And how much part time?

A. About two and three days a week, at the most.

Q. Now, when did the Crescent Amusement Company, or any of its affiliates, or, rather, when did the Rockwood [fol. 706] Company come into Central City?

A. I believe it was the latter part of 1937, when they acquired the State Theater—the Selba Theater.

Q. Did they buy that theater from Guy D. Martin, J. R. Martin and A. J. Mercer?

A. I don't know whether they bought it or not.

Q. They began operating it?

A. Yes, sir; in fact I didn't think it ever closed; it carried right on through.

Q. Now, after they began operating it in the later part of 1937, you and Mr. Martin, were you and Mr. Martin still running the Empress?

A. At that time I had the Empress by myself; we had dissolved our partnership.

Q. At the time the Rockwood took over the State?

A. Yes, sir.

Q. How long did you operate the Empress before you sold the Empress to the Rockwood Company?

A. Approximately a month.

Q. Why did you make that sale?

A. You mean after the acquired the Selba?

Q. Yes?

A. Approximately a month.

Q. Why did you make that sale?

A. I thought it would be best to get together and run together than it would be to run in opposition.

[fol. 707]

Q. Run what?

A. I thought it would be better to get together and run together than to run in opposition.

Q. In opposition to Rockwood?

A. Well, in opposition to any one that gave me opposition.

Q. Did Mr. Stengel or Mr. Sudekum approach you concerning the sale of the Empress Theater there?

A. I approached them first.

Q. You are sure of that?

A. By letter, yes, sir.

Q. They never said anything to you about you selling out your theater to them at all?

A. I didn't know either one of them prior to their coming into Central City.

Q. Well, did any representative of theirs talk to you about selling your theater until you talked to Mr. Stengel and Mr. Sudekum?

A. I don't recall it at all.

Q. Did you sell your theater to Rockwood because you realized you couldn't compete with Mr. Sudekum's buying power?

A. Well, I sold to it because I got a pretty good price, and I realized that any opposition in there, with a good manager, would make it tough on me, and I was running

[fol. 708]

continuously at that time.

Q. Was one reason you sold to him was that you realized you couldn't compete with his purchasing power?

Mr. Armistead: I object to that; he has already given his reason.

The Court He can give his reason again.

Mr. Dobey: Q. Was one of the reasons you sold to Mr. Sudekum was because you couldn't compete with Mr. Sudekum's buying power?

A. I couldn't complete with any one that would run the theater like it should be.

Q. Well, will you answer my question yes or not?

A. Yes.

Mr. Armistead: Well, explain to him what you mean by buying power; I know I haven't thoroughly understood it.

Mr. Dobey:

Q. You answered that yes; you- answer was yes?

A. Yes, that was one of the reasons. Anybody that runs a theater correctly; I had that in my answer.

Q. Wait a minute; the question was, was one of the reasons you sold to Mr. Sudekum was because you realized [fol. 709] you couldn't compete with Mr. Sudekum's buying power? I would like for you to answer yes or no to that.

The Court: You can answer that yes or no, according to the facts.

A. I will answer it yes and say that it would apply to anyone that would run the theater in the same manner as Mr. Sudekum would run it.

[fol. 710] Mr. Dobey: I accept that answer.

The Court: Overruled.

Mr. Dobey: As long as it is limited to anyone who would run it in the same way Mr. Sudekum would run it.

Mr. Armistead: He is his witness, if I understand the law.

Mr. Dobey: I accept that answer.

The Court: Oh, I thought you said you excepted to the answer.

Mr. Dobey: No, I accept it. I accept the witness' statement that that was one of his reasons he sold was because

he realized he couldn't compete with anyone who ran a theater like Mr. Sudekum did.

The Court: I understood that.

Mr. Dobey:

Q. When you sold out to Mr. Sudekum, did he give you a job?

A. Yes, sir.

Q. What was that job?

A. Operating a theater, Theater Manager.

Q. Which one?

A. The Selba Theater, in Central City.

Q. Did Mr. Sudekum continue to operate the Empress to the same extent that you were operating it, as far as [fol. 711] days it was open?

A. For a short time, yes sir.

Q. For a short time?

A. Yes.

Q. For how long?

A. I answered that a while ago, that is what I thought you meant a while ago.

The Court: Your answer "about a month" was, as I undertood it, that you were operating the Empress for about a month after Mr. Sudekum acquired the Selba.

A. That is what I am trying to answer now.

Mr. Dobey:

Q. He has misunderstood my present question. My present question is, how often was the Empress open during the week before it was acquired by Rockwood?

A. We ran it every day because I was running in opposition to the Selba Amusement Company.

Q. You were running it every day?

A. Yes.

Q. When Rockwood acquired the Empress, you became Manager of the Selba. How often did Mr. Sudekum keep the Empress open, how many days a week did it run?

A. After he took over the Empress?

[fol. 712] The Court: No, after he became the Manager of the Selba, of course after he took over the Empress. But that was——

A. I don't think he ran but a few days, just a few days, to clean up what pictures were booked, possibly.

Mr. Dobey: Q. Then the Empress closed down?

A. Yes.

Q. How long did it stay closed down?

A. They just ran along on special occasions there, I don't think it was operated regularly for several months, six or seven months, I mean regular days, but on holidays and things like that we would open on special things.

Q. Is it operated regularly now?

A. No sir; part time.

Q. That part time operation began soon as Mr. Sudekum bought it out?

A. The house was closed for a while.

Q. I mean, when you sold it, it was closed?

A. Yes sir.

Q. You were operating it continuously until *to* sold it?

A. Yes sir.

Q. Now, after you sold out to Mr. Sudekum and you became Manager of the State Theater, I believe the name was changed to State, at that time?

[fol. 713] A. Yes sir, a short time after.

Mr. Armistead: In order to keep the record straight, Counsel don't understand that there was any sale to Mr. Sudekum, the Selba being sold to Rockwood.

Mr. Dobey:

Q. I beg pardon. To Rockwood.

A. That is correct.

Q. After you became Manager of the State Theater at Central City, did anyone from the Crescent Amusement Company, and that would be about the middle of 1937, wouldn't it, the latter part of 1937?

A. No. You mean when I went into the Selba?

Q. When you went into the State as Manager for Rockwood?

A. That was the first of 1938. I didn't sell out until 1938, the first of the year.

Q. After you became Manager the first part of 1938 of the State Theater for Rockwood, did anyone connected with Crescent Amusement Company or Rockwood Amusement Company, direct you to go over to Greenville, Kentucky, to negotiate for the acquisition of the theater there?

A. Not directly, no.

Q. Why do you say "not directly?"

A. Whether this will answer: I was more or less interested in going to Greenville in view of the fact that I lived there and I did go to Greenville and measured and secured the price of a lot, but they didn't know anything [fol. 714] about it until after I had done that and told them it might be available.

Q. They didn't know anything about it?

A. I talked to Mr. Stengal after I had already done it.

Q. Did he know you were going over there before you went over?

A. I don't think so—Well, yes, I did tell him there was a garage burned and an ideal building lot became available, I mentioned it to him, and he said "Well, you might get the information on it and tell me more about it later".

Q. Then you went over and measured this lot?

A. Yes sir.

Q. Did you do that very ostentatiously, that is, did you make a great show about measuring the lot in town so that Mr. Head, who was operating the theater in Greenville, would find it out?

A. I measured it in the day time of course, they knew I was in the show business and it was right next door to the theater or there was only one lot between it and the theater, the lot we were thinking about.

Q. I see. When you came back after measuring that lot, did you report the fact that you had looked at that lot to Mr. Stengel?

A. About a week later.

Q. What did he say?

A. He just said, well, if they don't want to sell it, we will [fol. 715] drop it. And they wouldn't sell it, wouldn't accept the proposition.

Q. You mean, they wouldn't sell the lot?

A. No, they wouldn't sell it, they wouldn't make me a price on it.

Q. Did you know who you were dealing with?

A. On the lot, you mean?

Q. Yes.

A. It belonged to Mr. Oscar Irvin, he is from New York City.

Q. Did you make any effort, under the direction of anyone, looking toward the making of preliminary plans, other than measuring the lot?

A. Yes sir, I did.

Q. Did you contact Mr. Head at that time?

A. No sir.

Q. Did you contact Mr. Head at a later date?

A. Who ran the theater?

Q. Yes.

A. No sir.

Q. Did you tell anyone at Greenville why you were measuring that lot?

A. No sir, didn't have to. Everybody thought that is what we were going to do, I didn't have to say a word. It is a very small town.

Q. Who told you about that site over there at Greenville?

A. I lived in Greenville, I was there when the garage [fol. 716] burned and talked about it the very next morning.

Q. Did you ever discuss it with Mr. Sudekum?

A. I don't believe I ever did.

Q. Now, you know, do you not, that Mr. Head, at a later date, sold out to the Rockwood Amusement Company?

A. Yes sir.

Q. Now, after he sold out to Rockwood Amusement Company, did you go to Mr. Head and apologize to him for starting those rumors in Greenville?

A. I told Mr. Head if he thought or had any hard feelings against me for any of the things that had been started, I certainly hoped he wouldn't hold it against me because we should be friends.

Q. Did you tell him you were ordered to go over there and start those rumors?

A. No sir, I didn't tell him that.

Cross-examination.

By Mr. Armistead:

Q. Mr. Pittman, prior to the time that you became associated with Mr. Martin in the management or operation of that Selba Theater in Central City, Kentucky, did you operate a theater in Greenville, Kentucky?

A. Yes sir.

Q. What year was this?

A. 1922 to 1927, I believe, and then, later, at another [fol. 717] date—would you like to have that?

Q. Let's develop it step by step.

A. All right. The first time was 1922 to 1927.

Q. Did you close that theater or sell it or what?

A. I sold it to the Selba Amusement Company in 1927.

Q. Then what business did you engage in?

A. I went to Central City for Mr. Martin.

Q. To whom did you sell that theater in 1927 in Greenville, Kentucky?

A. The Selba Amusement Company.

Q. So then it had a theater in Central City, that is the Selba Theater?

A. Yes.

Q. They had a theater in Greenville, Kentucky?

A. Yes sir.

Q. What was its name?

A. At that time?

Q. Yes sir?

A. It has changed so much I don't remember. Let's see, I believe it was the Mecca at that time.

Q. The Mecca?

A. Yes sir.

Q. How long did Selba Amusement Company operate the Mecca Theater in Greenville?

A. Approximately a year, or year and a half.

[fol. 718] Q. Did it close out or sell out, or what?

A. They eventually closed out. They were getting business in Central City.

Q. By the way, how far is Central City from Greenville?

A. Seven miles.

Q. What is the population of Central City?

A. 4300.

Q. And of Greenville?

A. About 2300.

Q. Now then, when you went to Central City, there was only one theater there, the Selba Theater?

A. That is right.

Q. The Messrs. Martin were the principal stockholders in that?

A. That is right.

[fol. 719] Q. Now did you gentlemen while you were operating that theater hear that there would probably be opposition in Central City?

A. We did.

Q. Who did you understand then or were you informed was liable to come in there and open up an opposition theater?

A. We were advised that Lee Moffett at Owensboro was coming in to build a theater.

Q. How far is Owensboro from Central City?

A. About thirty five miles.

Q. So when you gentlemen heard that Mr. Moffett was liable to come into Central City, and open up an opposition theater, was that the Selba Theater Company, was that when you got the lease on this store building and converted it into the Empress theater?

A. That was the time Martin and I obtained the lease on the store building and converted it into the Empress theater.

Q. You and Martin were partners?

A. Yes, sir.

Q. And the Selba Amusement Company?

A. The Selba had had no part in the Empress.

Q. Why did you and Martin go down there and open up this Empress?

A. To protect ourselves.

Q. You all didn't belong to Moffett's chain, did you?

[fol. 720] A. No, sir.

Q. As I understood you and Martin were operating both of these theaters there, then you took over the Empress?

A. Yes, sir.

Q. Did you and Martin have a falling out, or what was the trouble?

A. We couldn't meet the running of the Selba and I withdrew and Mr. Martin took our interest in the Selba in the way of equipment, and I took the Empress for that time.

Q. That partnership was dissolved?

A. At that time, yes, sir.

Q. And Martin took the Selba theater and you took the Empress Theater?

A. Yes, sir.

Q. Now then you all were competing with each other, is that right?

A. Yes, sir.

Q. Well, what kind of a manager was Martin there at the Selba theater being managed and operated by him?

A. How is that?

Q. Was he an efficient manager or was he a poor one?

A. I had no trouble about getting business, with all the

modesty in the world I think it was poorly managed. They were interested with other business and did not devote very much time to the theater.

[fol. 721] Q. Didn't Martin then later advertise the theater for sale?

A. That was done sometime later, he wanted to lease or sell the theater.

Q. You knew it?

A. Yes, sir.

Q. Other operators or theaters knew it?

A. Yes, sir.

Q. Now about that time, or shortly after that time, did the Rockwood Amusement Company buy the Selba Theater?

A. Yes, sir, right about that time.

Q. Let's get the seating capacity of the Selba, how many seats did the Selba have approximately, take the Empress first, how many?

A. Three hundred.

Q. How did the Empress compare in appearance with the Selba?

A. At that time it was just about as good, a smaller house but the general outward appearance was just as good.

Q. Was the Selba getting first run pictures?

A. Yes, sir.

Q. What kind of pictures were being exhibited in the Empress?

A. I was playing two and three years old.

Q. You were getting good patronage?

[fol. 722] Q. I was running for ten cents.

Q. Were you getting good patronage?

A. I was doing capacity business.

Q. How was the Selba doing?

A. They were not doing so good.

Q. How much were they charging?

A. Their top admission I think was thirty cents.

Q. Now you say that Rockwood bought Selba out and a short time after that you approached Rockwood to find out whether or not they would be interested in buying the Empress, and did Rockwood name a price?

A. I named a price.

Q. Was there any dickering about it, or did Rockwood accept *accept* that price?

A. The entire deal I don't think took over three minutes, I don't think.

Q. They accepted your price?

A. Yes, sir.

Q. As a part of that transaction or trade, was it a condition that you were to be employed by Rockwood in any capacity?

A. It was not mentioned until after I had sold out.

Q. Now this theater over at Greenville, Kentucky, who was operating that?

A. Griff Head.

[fol. 723] Q. Had you known Griff Head for some time, or how long had you known him?

A. I had known Griff Head for five or six years.

Q. Did the Selba theater, the pictures they got there, did it have any clearance over Greenville?

A. On some of the products, yes, sir.

Q. From these major companies?

A. Some of the major companies, yes, sir.

Q. I say over Greenville, did it have any clearance over Central City?

A. On the same basis, yes, sir.

Q. Well after Rockwood entered Central City, did you have any reason to believe that you could not continue to get the same class of pictures as you had been exhibiting there with your theater?

A. That didn't enter my mind, I thought I could still get the same class pictures.

Q. Do your remember what major Companies the Selba was exhibiting when it sold out to Rockwood?

A. When they sold out to Rockwood I do not remember anything there for about three or four months, and my answer to that would have to be more or less a guess, I don't know some of the major companies, but I do know that some of the major companies were, I know some of them though.

Q. Could you give us their names?

[fol. 724] A. They were playing Paramount and Fox, I can't think of the others, I wouldn't say definitely.

Q. How about Greenville, what major companies were they playing?

A. Greenville was playing MGM, R.K.O. I believe.

Q. From what experience you have had in past years, in purchasing films? How long an experience have you had?

A. About fourteen years, yes, sir.

Q. Acting as an independent exhibitor?

A. Yes, sir.

Q. I will ask you this, Mr. Pitman, if from time to time even with the Major companies, you would *would* be signed up on a contract for their entire product for a season, and if at the end of the season there was some pictures you did not play, if you did not play the entire product, although you were obligated under the contract to do so, was any adjustment made with you?

A. Yes, we received adjustments sometimes at the end of the year.

Q. And cancellations by some of the Major companies to get a contract in force?

A. For the ensuing year, yes, sir.

Q. If there were fifty-two pictures you were obligated under the contract to buy and exhibit, and at the end of the year you had only played we will say thirty of those [fol. 725] pictures, which I understand you were getting from the company, did the company relieve you of your obligation to pay for the remaining twenty pictures?

A. Provided you would make a contract with them for the product for the next year.

Q. It was adjusted?

A. The chances would be quite likely that it would be if we took the product, at least in my case.

Q. I mean in your case?

A. Yes, sir.

Q. How did these film companies, these distributors and producers sell the pictures, sell the pictures to the others at the same price, with a condition to get theirs also without any increase, and you might buy each year?

A. Yes, sir.

Q. Can you give us any instance where an independent or instances were independents had been operation theaters and a chain was operating a theater in opposition, where the film companies discriminated against the independent exhibitor and in favor of the chain operators, where there is a contract and they have been relieved of this obligation?

Mr. Dobey: Objection. Unless there is some basis shown for his knowledge of independent situations.

[fol. 726] Mr. Armistead: I just asked him.

The Court: Do you know of any?

A. I know of one in particular, Will Moffitt in Owensboro.

Mr. Armistead: What happened there?

A. He is still playing pictures there.

Q. Has he any opposition?

A. He has in Warner Brothers now.

Q. Do you know the operation of a theater in Owensboro?

A. I knew of that.

Q. Does that refresh your recollection as to that?

A. I don't know I don't think of any instance where they were, one definite case, and that is still in existence.

The Court: I do not think I quite understand that. What was your question, Mr. Armistead?

Mr. Armistead: I asked him to name me any instance to which he can refer, where the independent received the same sort of consideration that he had been receiving in the same town?

The Court: You mean from the same company?

[fol. 727] Mr. Armistead: From the same companies, yes, sir.

The Court: How is that pertinent to this case?

Mr. Armistead: This is like that, that the distributors discriminated against the independent in favor of the chain.

The Court: All right.

[fol. 728] Q. Now, you spoke of clearance that Greeneville had over Central City. Do you know how many days that was or what the amount of that clearance was?

A. No, I can't say exactly on that, Greeneville over Central City.

Q. How much did Central City have over Greeneville?

A. In some instances it was sixty days.

Q. Both theatres were being operated by ind-pendent exhibitors?

A. That is right.

Q. Now, you stated on your direct examination, referred to the manner in which Mr. Sudekum or Rockwood operated the theatre. Was it buying power or do you mean the manner in which the theatre——

The Court: I am inclined to think that objection was good. It is a question of what happened in this; not what happened in some other case.

Mr. Dobey: The only instance he cited was out of the scope of the case entirely.

Mr. Armistead: All right. They have carried me from Nashville, Tennessee to Lexington, Mississippi in the bill

of complaint and here I am just forty-five miles from Cen-
[fol. 729] tral City, Kentucky, and they are objecting to that.

Mr. Waller: It is the insistence or contention of the Government that these distributors just uniformly and consistently discriminated against independents.

Mr. Raftery: I think that question is out of the case.

Mr. Armistead: Well, I agree with Mr. Raftery.

Q. When you spoke on your direct examination of the operation of a theatre or the manner in which a theatre is operated by Mr. Sudekum or Rockwood and that had an effect on you, just explain that.

A. I naturally assumed that they would, if they went in there, put an efficient manager in charge of the theatre. That was my assumption and no doubt it would have been correct.

Q. And that would have affected your theatre?

A. Certainly, it would have been very injurious to me.

Redirect examination.

By Mr. Dobey:

Q. Did you say that the Empress Theatre was opened solely to prevent competition coming into Central City?
[fol. 730] A. I beg your pardon.

Q. Did you say that the Empress Theatre was opened solely for the purpose of preventing competition from coming in?

A. Originally, yes.

Q. That was the sole purpose?

A. That was the original purpose indeed, yes.

Q. Is that a familiar device?

A. I don't know whether it is familiar or not but we thought it was smart. We had to do something.

Q. Now, do you know of any instances where the Crescent Amusement Company or the Rockwood Amusement Company or any of its affiliates have used that same device?

A. I don't know.

Q. Do you know of instances where the Crescent Amusement Company or the Rockwood Amusement Company have opened a theatre under those circumstances and have then closed the theatre down after the independent either abandoned his plan to come in or after he had closed up?

A. I don't know of that, no, sir. The only situations I am familiar with are the two we have discussed, Greeneville and Central City. That is the only places I have been in the show business.

Q. Did you ever pay for any pictures that you didn't play?

A. Plenty.

Q. Do you know of any instances since you became manager of a theatre for the Rockwood Amusement Company [fol. 731] where the Rockwood Amusement Company has ever paid for a picture it didn't play?

A. I don't know. I have nothing to do with buying pictures.

Q. Were all of the pictures that were used at the Empress Theatre two and three years old, all of them?

A. Practically every one, yes, sir.

Q. Now, had they previously been played at the Selba Theatre?

A. Not all of them, no, sir.

Q. Some of them?

A. Some of them.

Q. And others had not?

A. Yes, sir.

Further this witness saith not.

* * * * * * * *

[fol. 732] C. G. Lawing, Called on behalf of the Government, being first *first* duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. C. G. Lawing, Charlotte, North Carolina, 629 Oakland Avenue.

Q. What is your occupation?

A. I am in the theater business.

Q. Whereabouts?

A. In Albemarle and Norwood, North Carolina.

Q. Managing theaters there?

A. Yes.

Q. Did you formerly operate a theater at Brownsville, Tennessee?

A. Yes, sir.

Q. When was that?

A. From about 1932 through about July 1936.

Q. Had you formerly operated a theater at Paris, Tennessee?

A. Yes, sir.

The Court: When did you operate in Paris, Tennessee?

A. When?

The Court: Yes.

[fol. 733] A. From about June 1935 to about July, 1936.

Mr. Wright:

Q. In July, 1936, that theater was sold to the Crescent Amusement Company?

A. I didn't catch the first part of your question.

Q. In July, 1936, your interest in those theaters was sold to the Crescent Amusement Company?

A. Yes, sir.

Q. When was the first time that you talked with anyone from the Crescent Amusement Company about your theater in Brownsville?

A. Well, about February, I believe it was, 1935, a Mr. Castleberry and a Mr. McGowan, in February, 1935 came into Brownsville, but so far as talking about the theater, I don't know that anything transpired with reference to that.

Q. What time was that with reference to the time that the Crescent Amusement Company started to build a theater there?

A. I believe they announced about January, 1935, by a banner on a store building that they were to build a theater in Brownsville.

Q. Was the sign on a store building?

A. Yes.

Q. Do you recall what the sign said?

A. Not exactly, except this building will be remodeled into an up-to-date theater, to be operated by the Crescent Amusement Company.

[fol. 734] Q. Was this conversation with Castleberry and McGowan about the time that sign was put up?

A. Yes, sir, about the same time, yes, sir, just about.

Q. Do you remember about what the substance of that conversation was?

A. Nothing definite, except that they just made some mention of the fact that they were going to put up a nice theater in the town and they thought it would be a credit to Brownsville.

Q. Did you say anything to them about that.

A. Nothing that I recall, no, sir.

Q. What did you do then?

A. Well, they came back from time to time, for what I never really knew. But, of course, I knew they were representatives of the Crescent Amusement Company, they had told me that they were, but some time along about that time I came to Nashville to talk to Mr. Sudekum about the town and tried to impress him with the fact that I didn't think it was a large enough town to justify a chain operation.

Q. Just a minute, now. When did you see him?

A. I believe that was possibly about February, 1935.

Q. You saw him at his office in Nashville?

A. Yes, sir.

Q. Anyone else present, there?

A. No, sir.

Q. Go ahead with the conversation?

[fol. 735] A. Well, I had a talk with Mr. Sudekum with reference to the town. I told him I liked the town very well, that it seemed that my operation was probably adequate for the town, and that I would like very well to stay there, I had been there for several years, I like the town, and the people like me very well, that had practically raised my family in Brownsville and that I would like to remain there and call it home. But that was to no avail, I don't recall just what Mr. Sudekum said, but he left the impression that they were going ahead with their operation there.

Q. How big a town was Brownsville, then?

A. About 3,000.

Q. And did they go ahead with their operation?

A. Yes, sir.

Q. When did they open their theater there?

A. It was built some time in the Fall of 1935, I can't recall the exact date, sir.

Q. Do you remember the name of it.

A. The Capitol Theater.

Q. What then did you do, after you had this talk with Mr. Sudekum?

A. Well, I went back to Brownsville. I knew that the town wouldn't justify two theaters there and that I would eventually have to find something else to do and I went [fol. 736] into a town of his, Paris, Tennessee.

Q. How big was Paris?

A. Paris was about 8,000 people.

Q. How many theaters were operated there?

A. Only one, sir.

Q. Who was operating that?

A. Crescent Amusement Company, Mr. Lawrence as partner or manager.

Q. What was the name of that theater.

A. Capitol Theater.

Q. When did you open a show there?

A. I opened there with an open air show.

Q. When was that?

A. About May or June, 1935, I believe.

Q. What do you mean by an open air show?

A. Well, I had a 40 x 60 tent, and just rented a vacant lot there and put some seats and projection equipment in it.

Q. How long did you operate this tent show?

A. Up till about the First of November, 1935.

Q. Then what did you do in Paris?

A. Well, I made a lease of a building there and moved the greater part of this equipment inside.

Q. Did you remodel it into a theater building?

A. Yes.

Q. What was it called?

[fol. 737]. A. Called the Gem.

Q. That was the theater you operated at Paris at the time you sold out to Crescent in 1936, July, 1936, in Paris?

A. Yes sir.

Q. Do you recall what films you were able to license for your theater at Paris?

A. Well, I started there with nothing but Paramount. They had several years' product open in the town.

Q. That was product that had not been bought by Crescent there?

A. Yes sir.

Q. I will hand you this contract for the Paramount 1934-1935 product, dated June 26, 1935, and ask you if that is your signature?

A. Yes sir.

Q. That is the contract you made with Paramount for the operation at Paris?

A. Yes sir.

Mr. Wright: I will have this marked with the next number, Exhibit P-13.

Mr. Waller: With regard to this Brownsville situation it seems that a few days ago was the first time that was mentioned, in a bill of particulars. That bill of particulars required them to furnish all information that they intended to go into, within thirty days of trial, that they [fol. 738] knew about. They asked us to answer various interrogatories as to all the towns in which there was any opposition and Brownsville was among the towns mentioned and our answers to the interrogatories included Brownsville; so they knew about Brownsville long before the thirty days was up, so we insist that this situation is not proper in this case.

Mr. Dobey: I think he is a little confused on the particulars. Our bill of particulars was in the thirty days period and included Brownsville, but that the bill of particulars in the last two weeks or so included Paris, Tennessee, also; isn't that correct?

Mr. Waller: No, it is not correct.

Mr. Dobey: Then it is the other way around?

Mr. Waller: The other way around.

Mr. Dobey: That is the reason that we knew about Paris Tennessee, but we didn't know about Brownsville until within the thirty day period. In any event, if they desire a continuance with respect to this particular evidence, they are at liberty to request it and the court is at liberty to have the pleadings amended at the close of the evidence [fol. 739] If that is necessary.

The Court: All right, I overrule the objection at this time.

Mr. Wright:

Q. What other major product were you able to get for exhibition in Paris?

A. Well, I got the 1935-1936 Fox contract.

Q. I will show you this Fox contract for the 1935-1936 season dated February 13, 1936, and ask you if that is your signature there?

A. Yes sir.

Q. That is the contract you made with Fox?

A. Yes sir.

Q. And that letter attached is the letter of transmissal you received from Fox with the contract?

A. Yes sir.

Q. Dated March 6, 1936?

A. Yes sir.

Q. You received it on or about that time?

A. Yes sir.

Mr. Wright: I wish to have the letter and contract marked as Fox Exhibit, Next number.

(Contract & Letter marked Exhibit F-1.)

Q. Outside of the Fox contract of the 1935-1936 season, [fol. 740] were you able to make a season contract with any of the other major film distributors for their product there at Paris?

A. No sir, except some few pictures, I believe, from RKO that the Capitol was not running.

Q. Well, those you didn't get under a season's contract, those were what were known as spot booking?

A. Spot booking.

Mr. Waller: We object to that as the contract would be best evidence.

The Court: Alright, let's see the contract.

Mr. Wright:

Q. Did you attempt to buy second run product for your use, at Paris?

A. Yes sir, I mentioned it to some of the salesmen or managers from some of the other companies but they seemed to think that Paris was a little small for second run pictures. [fol. 741] Q. What company told you that?

Mr. Armistead: We object to that as hearsay testimony.

By the Court:

Q. Did any particular company tell you that?

A. I would say all of them did that I contacted because I didn't get any second run pictures.

Mr. Waller: Now, his answer is just generalities and a conclusion. He said he wouldn't say it because he hasn't recalled any companies. He is drawing a conclusion.

The Court: I understood him to say that none of those distributors would sell him any second run pictures; that Paris was such a small town. Is that what you said?

A. Yes sir.

Mr. Waller: I think all he has said now—he is assuming that that was true because he didn't get the pictures. That is the way I understand him.

By the Court:

Q. Well, is that a presumption on your part or did any of them tell you that specifically?

A. They told me that specifically.

[fol. 742] The Court: How is that material, though, in this case?

Mr. Wright: We want to show that when he went into Paris——.

The Court: They wouldn't sell him any pictures or second run pictures?

Mr. Wright: He did get first run pictures. We want to show that he couldn't get any second run pictures there either although when Mr. Sudekum moved into Brownsville in a town of three thousand he was able to repeat pictures there after Mr. Lawing's theatre.

The Court: All right. Go ahead.

Mr. Raftery: We have got an entirely different situation. We are dealing with a tent show.

The Court: Well, in the beginning it was a tent show.

Mr. Raftery: That is the thing we are talking about.

By the Court:

Q. Did any of them refuse you pictures because you were [fol. 743] operating a tent show?

A. No sir.

Q. Or did they give that as a reason?

A. Well, at the time involved, your Honor, I moved from the tent into a building.

Q. You are speaking now about contracts you tried to make after you closed the tent and moved into a building?

A. Yes sir.

By Mr. Wright:

Q. You continued to try to get a contract for the theatre continuously all the time you were operating at your tent show and the Gem, did you not?

Mr. Waller: That is objected to as leading and suggestive.

Sustained.

By Mr. Wright:

Q. Mr. Lawing, how often did you go into the film exchanges at Memphis and try to buy pictures while you were operating the tent show and theatre at Paris, Tenn.?

A. Well, I was in Memphis nearly every Monday. I picked up most of my films, my film service, and every time I would see any manager or salesman of any of the film companies I would try to make some deal for films for Paris. [fol. 744] Q. Did you make the rounds of all the companies?

A. Yes sir, because I was doing business with practically all of them in one of the other situations.

By the Court:

Q. Well, could you get any films?

A. Nothing other than what has been brought out.

Q. That is, your contract with Fox and spot bookings with RKO and some with Paramount?

A. Yes sir.

By Mr. Wright:

Q. That is with respect to the major companies?

A. Yes sir.

Q. You did get independents?

A. I did have some independent pictures, yes.

Q. What sort of policy was Crescent operating the Capitol at Paris on while you were operating the Gem?

By the Court: Under what sort of policy?

By Mr. Wright:

Q. What policy was Crescent operating the Capitol on in Paris while you were operating the Gem theatre there?

A. Well, they were operating under a four picture policy at that time.

Q. What do you mean by that?

A. Well, on Monday a change and a Tuesday change and [fol. 745] a Wednesday-Thursday and a Friday change.

By the Court:

Q. Four changes a week?

A. Yes sir.

By Mr. Wright:

Q. What admission prices were they charging?

A. Ten, fifteen and twenty in the afternoon, and ten, fifteen and twenty five at night.

Q. Will you explain what those admission prices were for?

A. I don't know.

Q. Ten cents for what, fifteen cents for what and twenty and twenty five cents for what?

A. I would say ten cents for children at all times and fifteen cents in the balcony in the afternoon and twenty cents downstairs, and ten and fifteen in the balcony at night and twenty five cents downstairs.

Q. What was the admission price policy that you were operating the Gem on?

A. Under a ten and fifteen cent policy.

Q. What does that mean, ten cents for children and fifteen cents for adults?

A. Yes sir.

Q. Now, at the time the Crescent Amusement Company opened its Capitol Theatre in Brownsville, Tennessee what [fol. 746] was the policy you were operating your Southland Theatre on?

A. You mean after they opened or before they opened?

Q. Before they opened.

A. Before they opened we were charging fifteen and twenty five at all times.

Q. Fifteen for children and twenty five for adults?

A. Yes sir.

Q. How many changes a week were you making?

A. I was making three and four changes at that time.

Q. Just varying from week to week?

A. Yes sir.

Q. Depending on the pictures you had?

A. Yes sir, that is right.

Q. Then what sort of policy did they open the Capitol at Brownsville on?

A. Under a ten and fifteen cent policy.

Q. That is, ten for children and fifteen for adults?

A. Yes sir.

Q. How big was the theatre that they put there?

A. I was never in the theatre. I would say that it seated four hundred people from what I had been told about it.

Q. Is that all downstairs?

A. No. I would say that one third of the seats were upstairs.

[fol. 747] Q. Was the balcony reserved for the colored trade?

A. Yes, for the colored trade.

Q. How big was your house?

A. Two hundred seats.

Q. Well, during the 1934-1935 season had you exhibited Metro pictures in your house at Brownsville?

A. 1934-1935, yes.

Q. I will hand you this contract dated September 29, 1934, for the 1934-1935 feature products of Metro and ask you if that is the contract you made for those pictures during that season?

A. Yes sir.

Q. And the telegram that is attached is the telegram you received with the approved contract?

A. Yes sir.

Q. On or about the date it bears there, October 1, 1934?

A. Yes sir.

Mr. Wright: I will ask to have this marked Government's Exhibit L-8.

(Contract so filed and marked.)

Q. Now, how long had you been playing Metro pictures there in Brownsville?

A. Ever since I had been operating the theatre there.

Q. That was four years?

[fol. 748] A. Yes sir.

Q. Had you played most of their pictures every year?

A. I played them one hundred per cent every year, yes sir.

Q. Then did you attempt to negotiate for the exhibition of the 1935-1936 pictures in your theatre there?

A. Yes sir, on numerous occasions.

Q. Who did you talk to?

A. Mr. Mock, representative of Metro-Goldwyn-Mayer and Mr. Willingham, who was the branch manager in Memphis of Metro-Goldwyn-Mayer.

Q. When was it you talked to them about the 1935-1936 season?

A. It was on so many occasions it would be practically impossible for me to set the exact date but I would say it was somewhere in the vicinity of when they started trying to sell the season.

Q. That would be when?

A. Either in the spring or summer of 1935.

Q. What did they tell you about the 1935-1936 Metro pictures?

A. Well, they told me they couldn't sell there under the circumstances until they had permission from New York to do so.

Q. Do you recall whether they took an application from you?

A. Yes, they took several applications.

Q. What do you mean by that?

[fol. 749] A. Well, they would take an application for a contract and say that they had looked it over and didn't seem to think that it was exactly proper and they would come back for some sort of improvement on it.

Q. How many times did that happen?

A. I believe it was three times in that particular instance.

Q. What happened with reference to the final application?

A. I never heard any more from it.

Q. Did you try to find out?

A. Yes sir.

Q. Did they tell you anything about the application?

A. They said that they hadn't heard from New York on it and that as soon as they did they would notify me.

Q. Did they ever notify you?

A. No sir.

Mr. Wright: I will ask to have this contract between the Crescent Amusement Company and Metro-Goldwyn-Mayer for the first run exhibition of 1935-1936 Metro features in Brownsville, dated December 14, 1935, marked Government's Exhibit L-9 for identification.

I would like also to have marked as Government's Exhibit No. 46 for identification a letter from J. F. Willing-

hom, Branch Manager, Metro-Goldwyn-Mayer Distributing [fol. 750] Corporation to Mr. Tony Sudekum, Crescent Amusement Company, Nashville, Tennessee, dated December 5th, 1935.

The Court: Do you offer both instruments in evidence?

Mr. Wright: Yes.

The Court: Is there any objection?

Mr. Waller: No sir.

The Court: All right.

(Instruments so filed and marked.)

Mr. Wright: (Reading.)

"December 5th, 1935.

Mr. Tony Sudekum, Crescent Amusement Co., Nashville, Tenn.

DEAR MR. SUDEKUM:

Inclosed you will find contracts for your Capitol Theatre, Brownsvile, Tenn. in accordance with our long distance conversation yesterday. We consider these prices very fair and equitable for a town with the population that [fol. 751] Brownsville has, based on past performances in this situation on guarantee and guarantee against percentages on our product.

Inasmuch as you refused to allow us to have any pictures in this situation on a percentage basis and we had a contract for this product sold with many pictures with a guarantee against a percentage arrangement think these prices are commensurate with the value of the pictures or what we would earn if the contract were played according to the sale we had made to your opposition, but which was rejected.

Prices as per contracts are as follows:

Two features, $75.00 flat rental, plus $3.00 score.
Seven Features, $60.00 flat renta-, plus $3.00 score.
Seven Features, $35.00 flat rental, plus $3.00 score.
Balance features, $15.00 flat, plus $3.00 score.
Two realers, $4.00 each, One reelers, $2.00 each.
Perfect Tribute $4.00.
Trailers, $1.50 each.
Two issues news per week, $2.50 per release.

We trust you will see to it that Mr. Shepard plays our product as certainly when we take the product away from

our old customer in Brownsville, Tenn. such as we are doing in this instance, and give it to you, you should give us 100 per cent representation in all your situations.

[fol. 752] We will appreciate your signing the Brownsville contracts as well as the contracts for Dyersburg, Paris and Union City, which you already have, returning them to us immediately upon receipt of this communication.

With best wishes to you and yours, I am

Sincerely, Metro Goldwyn Mayer Dist. Corp., J. F. Willingham, Branch Manager.

JFW-ES. Incl."

[fol. 753] Q. Did you play Paramount pictures in your theater at Brownsville for the 1934-1935 season?

A. Yes, sir.

Q. I will hand you this contract, dated September 17, 1934, between yourself and Paramount, for the 1934-1935, season pictures, and ask you if that is the contract you made with them at or about that date?

A. Yes, sir.

Q. I will ask to have that contract marked Exhibit P-14. (Contract so marked) How long have you been playing Paramount pictures there?

A. Intermittently ever since I had been in Brownsville.

Q. And did you try to negotiate for a season contract for the Paramount 1935-1936 features for exhibition at your theater at Brownsville?

A. Yes, sir.

Q. Whom did you have those negotiations with?

A. Mr. Bill Bugie and Scott Lett.

Q. Who were they?

A. They were representatives of the Paramount Exchange of Memphis, Mr. Bugie was the representative; and Mr. Lett was representative in my section.

Q. When did you first try to buy 1935-1936 pictures?

A. I tried to buy the 1935-1936 features at the same time I bought the 1934-1935; and they said they were taking no [fol. 754] more contracts at that time.

Q. When was the next time you tried to buy the 1935-1936 product?

A. As well as I recall, it was during the regular selling season of 1935-1936.

Q. What did they tell you?

A. They told me they would be unable to negotiate for product at that time for Brownsville.

Q. Did they tell you why?

A. No, sir, they didn't give me any definite reasons for it.

Q. Did they give any reasons?

A. No, sir.

Q. Did Mr. Lett take any application from you?

A. No, sir; I don't recall signing any application for Paramount.

Q. Did they tell you what they had done with the 1935-1936 pictures?

A. No, sir; the first I knew that they were being featured in Brownsville was when I saw an announcement of it in the newspaper.

The Court: Announcement of what?

A. Of some new Paramount product that would be exhibited at the Capitol Theater.

[fol. 755] The Court: That would be exhibited at the Capitol Theater?

A. Yes, sir.

Mr. Wright: I would like to have marked for identification the contract for the exhibition of the Paramount 1935-1936 pictures in the Capitol Theater at Brownsville, made between Mr. Sudekum and Metro-Goldwyn Meyer, dated August 22, 1935.

Mr. Raftery: You mean between Paramount?

Mr. Wright: Between Paramount; I beg your pardon.

(Said contract marked Exhibit P-15.)

Mr. Wright: Q. Were you using Fox pictures at your theater at Brownsville for the 1934-1935 season?

A. Yes, sir.

Q. I will hand you a contract between you and Fox, dated March 15, 1934, and ask you if that is the contract you made with them for the 1934-1935 season?

A. Yes, sir, this is the contract.

Q. The date on the contract, of March 15, 1934, is the date when you made the application?

A. Yes, sir.

[fol. 756] Q. And the letter that is attached, marked March 29, 1934, is the letter you received with the contract to have approved.

A. Yes, sir.

Mr. Wright: I will ask to have that marked with the next number. (Marked by Clerk Exhibit F-2)

Q. Then were you able to buy the Fox pictures again for the 1935-1936 season?

A. Yes, sir.

Q. And is this contract dated January 17, 1935, for the acquisition of the Fox 1935-1936 product in your theater at Brownsville the contract that you made?

A. Yes, sir.

Q. And the letter of transmittal attached, dated January 28, 1935, from Fox to you was the letter when you received approval of the contract?

A. Yes, sir.

Q. I will ask to have that letter and contract marked F-3. (Marked F-3) And here is a letter from the Crescent Amusement Company to Fox Film Corporation, dated February 11, 1935, that I would like to have marked with the next Government number.

(Marked Government Exhibit No. 47.)

And the reply from Mr. P. S. Wilson of the Fox Company to Crescent Amusement Company, dated February 15, 1935, and ask to have that marked Government Exhibit [fol. 757] 48, for identification. (Exhibit marked Gov. ex. 48, for identification)

Mr. Wright: Now, I offer Exhibit 47 and Exhibit 48 in evidence.

(Exhibits 47 and 48 put in evidence.)

The letter of February 11, from Crescent to Fox, reads as follows:

"DEAR MR. WILSON:

While I was in Atlanta, I intended mentioning to you the fact that we are opening a theater at Brownsville, Tenn, which, of course, is in the Memphis territory and we want that office to bear us in mind in the 1935-1936 product. You know that we are operating at Greeneville, as that situation is handled out of your

office, but on account of Brownsville being out of Memphis District, we thought it might possibly be necessary for Mr. Ballance to notify them—hence this letter. "At Gadsden and Decatur we can take the same commitment of second run pictures as contracted for, second run, at Nashville—rental the same as last season, $15.00, including score. The writer shall appreciate your advising her in this connection."

This letter was written to the Fox Film Exchange, at At-
[fol. 758] lanta, Georgia. The Reply of February 15, 1935, from the Fox Atlanta Manager to Miss Brockett at Crescent Amusement Company——

The Court: Who is that letter signed by?

Mr. Wright: The first letter is signed by M. Brockett, for Crescent Amusement Company. The reply is addressed to her, to the Crescent Amusement Company:

(Reading:)

"Dear Miss Mary:

Please pardon my delay in answering your letter of February 11, but as I have been out of the city it was held for my acknowledgment.

With reference to the first paragraph of your letter, I talked with Mr. Ballance regarding the Brownsville, Tennessee, situation. It so happens that at this point we have a very excellent account who has been playing our product 100% for years, features, shorts and news, and as a matter of fact the 1935-36 product was sold in this section and approved on January 17. The same condition also exists in Greeneville.

As you know, it is our policy, that where an exhibitor
[fol. 759] has been a good account, to continue to sell that exhibitor."

Were you also exhibiting the 1934-1935 product of Warner Brothers at your theater at Brownsville?

A. The 1934-1935 product?

Q. Yes; did Warner Brothers release product during the 1934-1935 season?

A. Yes, sir.

Q. I will now show you this contract dated July 7, 1934, for the exhibition of the Warner 1934-1935 season product

in your theater, and ask you if that is the contract under which you exhibited those pictures.

A. Yes, sir, that is the contract.

The Court: Is that for the 1934-1935 season?

Mr. Wright: Yes, sir.

Q. And the letter attached is dated July 20, 1934, from Warner to you; that is the letter that accompanied or accepted the contract?

A. Yes, sir.

Q. I will ask to have this contract marked W-1. (Contract so marked).

[fol. 760] The Court: Do you want to see that contract, Mr. Armistead?

Mr. Armistead: Yes, sir. I think at this time you could let us have all those contracts already made exhibits.

[fol. 761] Mr. Wright:

Q. Did you try to negotiate with Warner for the exhibition of 1935-36 season products for your theaters?

A. Yes, sir.

Q. Who did you negotiate with?

A. A Mr. Ochs, Byron Adams.

Q. This was with reference to the exhibition of their 1935-36 pictures in your theater at Brownsville?

A. Yes, sir.

Q. Who were they?

A. Mr. Ochs was the branch manager in the Memphis house and Mr. Adams was the salesman in my town.

Q. When did you talk to them about it?

A. I talked with them about signing of the 1934-5 contracts, but they also informed me that they were not taking more than one year contracts at the time.

Q. When was the next time you spoke to him about the 1935-36 pictures?

A. Well I spoke to them on quite a few occasions about the 1935-36 products; but they would not discuss it with me.

Q. Did they tell you why?

A. No, sir.

Q. Did they ever take an application from you?

A. No, sir.

[fol. 762] Q. When was the last time you talked to them about it, do you remember?

A. No, sir, I couldn't remember the exact date, but it must have been in early 1935 that we discussed the 1935-6 contract.

Q. Did they tell you definitely they were not going to sell you?

A. They did not tell me definitely they were not going to sell, but they said their hands were tied in any situation in which the Crescent had gone in to.

The Court: Said their hands were tied in any situation that Crescent had gone into. Who was it said that now?

A. That would be impossible for me to say, Your Honor, it was either the branch manager or the salesman there, I recall the conversation, but I couldn't recall the exact person.

Mr. Wright:

Q. Then I believe you said that after Crescent came into Brownsville, they opened at ten and fifteen cents admission?

A. Yes, sir.

Q. Then what happened to the policy you were conducting your house under?

A. I was supposed to meet their admission price.

[fol. 763] Q. And you went to ten and fifteen cents?

A. Yes, sir.

Q. And how many changes a week were they making?

A. I believe they were making four changes at that time.

Q. Did you shift your policy from three to four?

A. No, sir, I had a three picture a week policy there I believe all the time after they opened.

Q. Did you have enough good pictures left so you could shift to four?

A. No, sir.

Mr. Waller: Objected to, that is a conclusion.

The Court: Yes, sir.

Mr. Wright:

Q. Did you consider it advisable, or did you consider the advisability of changing from three to four when they opened with four?

A. No, sir, I never felt that Brownsville was large enough to justify four changes a week.

Q. From that time until the time you sold out in July, 1936, did you make any money on the operation of the house at Brownsville?

A. No, sir, I operated at a loss there almost continuously.

Q. When was the next time you saw anybody from the Crescent Amusement Company?

[fol. 764] A. Well Mr. Castleberry and Mr. McGowan were there several times during the time they were working on the building of the Capitol theater over there, and they came by and saw me on pretty near every occasion.

Q. What did you talk about with them?

A. Nothing that I recall of any consequence, only just generalities about the show business.

Q. After the Crescent house opened, when was the next time you saw any representative of Crescent?

A. I couldn't recall the exact date, but they were through there quite often from time to time I would see them, I would say every two or three weeks, something like that.

Q. Did you ever see Mr. Sudekum?

A. Not from the first time I came to Nashville, that I came to see him, up until this time.

Q. Until what time?

A. Shortly after they opened.

Q. Did you go over there to see him shortly after they opened?

A. No, I beg your pardon; I went to see him before they opened.

Q. That was the conversation you have already told us about?

A. Yes, sir.

[fol. 765] Q. When they put their sign up?

A. Yes, sir.

The Court: When did you say Mr. Sudekum was there?

A. I said first that I saw him in Nashville, after that he was there at Brownsville one night, and I was at the cafe there and walked through, Mr. Sudekum was there at the cafe and I walked through and spoke to him.

Mr. Wright: What conversation did you have with him?

A. Nothing specially, just social conversation.

Q. Did you finally come in to see him shortly before you sold out in the spring or summer of 1935?

A. Yes, sir, some time during the Summer of 1935, when I figured I would not be able to continue on, I went to see Mr. Sudekum's manager in Paris.

Q. Who was he?

A. Mr. Lawrence, and told him that I would like to see some one in connection with the company, it appeared to me that I had better make some sort of a deal with them, I did not have the money to move my equipment out to any other location.

Q. Then what happened?

A. Well Mr. Sudekum sent Mr. Castleberry down to Paris, Mr. Lawrence came to Brownsville and he picked [fol. 766] me up there, and I came back to Nashville with Mr. Castleberry and had a talk with Mr. Sudekum.

Q. When was that? When was this?

A. I believe it was the latter part of June or early in July, of 1936.

Q. The talk was in Mr. Sudekum's office in Nashville?

A. Yes, sir.

Q. Was any one else present?

A. No, sir, not that I recall.

Q. What was said then?

A. Well I explained to him just what I had explained to Mr. Lawrence, told him I was operating unprofitably down there, I though it might be best, we might make some sort of a deal that I could get out and find something else to do.

Q. Did you talk about Paris, too?

A. Yes, sir.

Q. What did he have to say?

A. I do not recall the exact conversation, he said we could work out something there with him that was satisfactory to both of us.

Q. Did you finally work something out?

A. Yes, sir.

Q. What was the proposition?

A. He was to give me seventy-five hundred dollars for [fol. 767] the two houses and I was to assume any and all outstanding indebtedness on the two situations there at the time.

Q. How was the seventy-five hundred dollars figured?

A. Well I merely figured just about the actual cost of the equipment and improvements on the buildings and so forth, that I had in the two towns.

(Recess).

[fol. 768] Q. Was this deal closed with Mr. Sudekum at $7500.00?

A. Was it closed?

Q. Yes.

A. Yes.

Q. At the time you had the conversation with him.

A. Not right at the time I had the conversation with him Mr. Sudekum informed me that he would discuss it with his men and have some of his representatives come down to Brownsville and consummate the deal.

Q. Did someone come down?

A. Yes.

Q. Who came down?

A. Mr. Castleberry and Mr. McGowan.

Q. Where was the deal closed?

A. I didn't catch the first word of your question?

Q. Where was the deal closed?

A. In an attorney's office in Brownsville.

Q. What was said there?

A. Well, there was very little left to be said. We started to draw up the bill of sale of the equipment of the two theaters and we got that fully drawn up and they wanted to insert a clause in there that I would agree to stay out of any Crescent town for a period of ten years, but they didn't offer any additional consideration or any consideration for it, so I wouldn't allow them to embody that clause into the contract.

[fol. 769] Q. Did you finally make any agreement not to compete?

A. Yes sir, I agreed in this contract not to go into any Crescent operation or affiliation in which they were operating at the time of the signing of that contract.

Q. For how long a period?

A. For five years.

Q. Have you got a copy of that agreement or the bill of sale that was finally made out?

A. I received a copy of it but I wasn't able to find it, sir.

Q. Have you searched for it?

A. Yes sir.

Q. Now, I believe you testified before, that this conversation you had with Mr. Lawrence just before you went into see Mr. Sudekum about making a deal was in June, 1935?

A. That should have been June, 1936. If I said that; it was just an error on my part.

Q. Now, during the time the Crescent was operating the Capital in opposition to your Southland at Brownsville, did they repeat at their theater any of the pictures that had previously been played at your theater?

A. Yes, they repeatd several, I couldn't say how many.

Q. Were they the bigger pictures?

A. They were the bigger pictures, yes sir.

Q. Of what companies, do you recall?

A. I recall they repeated there one or two Warner pic-
[fol. 770] tures and possibly two or three Metro's, as well as I can remember.

Q. They were Warner and Metro that you had played of the 34 and 35 that you had contracted? Is that right?

A. Yes sir.

Q. After you made the—closed the agreement and executed the bill of sale, did you see Mr. Sudekum again?

A. Yes.

Q. When was that?

A. It was abo-t a week or ten days after the deal was fully consummated, I was in Brownsville and I came back to Nashville and talked to Mr. Sudekum.

Q. How did you happen to go to talk to him then?

A. Well, Mr. Castleberry and Mr. McCuen suggested I go to see Mr. Sudekum, that he might be able to fix me up with some sort of a job.

Q. What was the talk you had with him there?

A. About the job, some sort of position with the Company.

Q. Did he offer you one?

A. Yes.

Q. What was the job?

A. I never knew the exact duties. I made a trip to Middlesboro, Kentucky and negotiated with Manring Real Estate Company up there with reference to their building a building for the Crescent Amusement Company in Middllesboro.

Q. What else did you do for him?

[fol. 771] A. I went to Cincinnati to see if there was any product available for Middlesboro.

Q. Over how long a period was ther?

A. The length of time I worked for them.

Q. Yes.

A. Only two weeks.

Q. Did you talk to him when you got back?

A. Yes.

Q. What was finally said?

A. Mr. Sudekum had suggested in the beginning that he would like to have an operation in Middlesboro and he thought possibly I might be the man to negotiate for it up there and possibly operate it, since it was quite some distance removed from his other Kentucky and Tennessee operations.

Q. What did you say?

A. I told him that, as well as I remember, I didn't particularly like the town of Middlesboro.

Q. Did you leave the Company then?

A. Yes sir.

Q. Then what did you do?

A. I went back to Brownsville where I was making my residence, at that time, then on into Memphis and negotiated for some porduct at a little town that someone had mentioned to me at Aberdeen, Mississippi.

Q. After you went back to Brownsville, did you notice whether the theater you had been operating had been [fol. 772] closed?

A. It was closed, to the best of my recollection, the same week that the deal was consummated with Mr. Sudekum.

Q. How about the theater in Paris?

A. I never went back to Paris.

Q. Your home was in Brownsville?

A. Yes.

Q. Do you know whether they closed the theater there or not?

A. I understood that it was closed.

Q. Do you know?

A. Yes, Mr. Castleberry told me on some occasion when he was through Brownsville that they had closed the Gem Theater there, the one I had been operating.

The Court: The Gem at Brownsville? I thought the Gem was at Paris?

A. At Paris was what he was talking about.

Cross-examination.

By Mr. Waller, for Defendants:

Q. What is your age?

A. Thirty-six this coming November.

Q. You are a native of North Carolina?

A. Yes sir.

Q. When did you first leave North Carolina?

A. I left North Carolina in December, 1927.

[fol. 773] Q. What business were you in in North Carolina?

A. In the theater business.

Q. In what place?

A. In Charlotte.

Q. Why did you leave Charlotte?

A. I was offered a better position in Memphis.

Q. With whom were you working at Charlotte?

A. I was Manager of the Royal theater in Charlotte with Mr. McDowell.

Q. Who owned that theater?

A. It was operated by Mr. Annagosta.

Q. Was it a circuit theater?

A. No sir, it was individually owned.

Q. You were offered a better job where?

A. In Memphis.

Q. By whom?

A. S. A. Mayer.

Q. When did you first know Mr. Mayer?

A. I first knew Mr. Mayer, I talked to him over the telephone from Charlotte sometime in November, 1927. Had had an Advance Agent that was working a road show picture through that territory and he asked me if I would be interested in going to Memphis with Mr. Mayer as manager of a theater, that he thought I might be the man that would suit him. And he made an appointment with Mr. Mayer and Mr. Mayer wired me to call him long distance one night [fol. 774] after 12:00 o'clock and talk to him about taking a position down there.

Q. Well, you moved to Memphis, then, did you?

A. In December, 1927, yes sir.

Q. Did you make your home then in Memphis for a while?

A. Yes sir, for several years.

Q. Were you married then?

A. Yes sir.

Q. You and your wife moved to Memphis?

A. Yes.

Q. Any children?

A. Not at that time, no sir.

Q. Well, did you buy a home in Memphis, or merely rent?

A. What?
Q. Did you buy a home in Memphis, or rent?
A. I merely rented at Memphis.
Q. You were in Memphis for a few years?
A. Yes.
Q. Where did you move to from Memphis?
A. I moved from Memphis to Brownsville.
Q. That was in 1932?
A. Yes sir.
Q. How did you happen to move to Brownsville?
A. Well, I was operating a theater, or rather I had a partnership there originally in the beginning and my part-
[fol. 775] ner was not transacting business satisfactorily and I had been going back and forth over the week ends to Memphis, I had maintained my residence in Memphis, so I decided it would be much more economical to move to Brownsville.
Q. Did you sever your connection with Mayer at that time?
A. I don't recall the exact date I left Mayer. But it was some time in 1929, right after the crash and business got to such a point over there that Mr. Mayer couldn't continue to keep a man on.
Q. Then it was that you went into partnership with someone in connection with the theater business?
A. No sir, I did some road show business at schools and churches around about Memphis over there before the time that I went into Brownsville.
Q. When did you first get your interest in the theater in Brownsville?
A. At the very beginning.
Q. Was that in 1932?
A. It was bought in 1931.
Q. Then you moved to Brownsville in what year?
A. It was some time in 1932, I couldn't recall exactly the month. I am sure it was in 1932.
Q. You had a partner there, did you, or was this man working for you that was not transacting the busi-
[fol. 776] ness satisfactorily?
A. He was a partner?
Q. He was the partner?
A. Yes.
Q. Did you buy him out when you went to Brownsville?
A. Shortly thereafter, yes.

Q. How much did you and he invest in this theater in Brownsville at the outset?

A. Well, I think I had about $200.00 in cash and some moving picture machines and few seats.

Q. Did he put up something, too?

A. He was supposed to.

Q. He didn't do it?

A. He may have raised fifty dollars, or something like that.

Q. You rented a store building there, did you?

A. Yes.

Q. And put in the theater seats that you already had?

A. Some few that we already had and we bought some other seats.

Q. You used the equipment you already had?

A. No sir, I traded that in on some Simplex Acme machines.

Q. What had that building been used for before you rented it?

A. It was some sort of mercantile establishment, a little drygoods store, I believe.

[fol. 777] Q. Did you change the floor?

A. Yes sir.

Q. And put a balcony in?

A. No sir, there was a small balcony already in that.

Q. A sort of mezzanine floor?

A. It had been offices.

Q. You put the screen at what end of the building?

A. At the front end as you came in off the street into the theater.

Q. Then where was your projector? Was that on the mezzanine floor?

A. No sir, the projector was on the outside of the building.

Q. Hanging over the alley?

A. There was an alley back there—no sir, it was just a vacant lot. The alley was some further back. The building at the time, it was built—it wasn't built on all the property that belonged to the builder.

Q. How many seats did you put in this building altogether? Was it 180?

A. We started the theater with somewhere around 180 or 185 seats, then later on, we re-seated and bought some brand new seats.

[fol. 778] Q. When was that?

A. I couldn't recall about that.

Q. How many brand new seats did you buy, Mr. Lawing?

A. About a hundred and sixty five, as I recall.

Q. What did you do with the old seats?

A. That would be impossible for me to answer, Sir. I don't recall what happened to the old seats.

The Court: Well, what difference does it make?

Mr. Waller:

Q. Now then, Mr. Lawing, what was your seating capacity after you got those new seats?

A. Two hundred.

Q. Now, how many of those seats were downstairs and how many in the balcony?

A. I beg your pardon. There were two hundred downstairs, and there was about, oh, not over twenty five or thirty in the balcony.

Q. And of those two hundred seats downstairs you say a hundred and sixty five were new seats?

A. Yes sir.

Q. What product did you say you were using in 1934-1935 in Brownsville before the new Crescent theatre was started?

A. I was using some product from practically every company.

Q. Did you have a contract with United Artists?

A. Yes sir.

[fol. 779] Q. For the entire output?

A. That I wouldn't be able to remember, whether it was the entire output or not.

Q. Well, did you play those pictures off in accordance with your contract?

A. I don't think that I did, no sir.

Q. Why not?

A. Well, I paid too much money for them in the first place and their exchange was in St. Louis at that time. They didn't have a Memphis office and I don't know that they have now, but the express was excessive on them and I think I paid them about $20.00 for them, for those pictures, average.

Q. And you figured that was too much so you just didn't play them?

A. I played some few of them.

Q. Do you remember when that contract was made?

A. I don't know.

Q. Did you buy any pictures from Universal?

A. During 1934-1935, I don't recall that I did, no sir.

Q. Don't you recall you bought three pictures and didn't play them?

A. From Universal?

Q. Yes.

A. I really don't know.

[fol. 780] Q. What was your experience with Columbia? Did you buy any pictures from Columbia for that season?

A. I believe I did, yes sir.

Q. Well, did you play them?

A. I couldn't recall about that, Sir.

Q. Don't you recall that as a matter of fact there were quite a number of those pictures you didn't play in accordance with the contract?

A. It seems that there was, yes sir.

Q. Now, you say you also had a contract with Metro, that is, with Loew's?

A. For 1934-1935?

Q. Yes sir.

A. Yes sir.

Q. Then the following year you made two or three applications for a new contract with Metro, you said, and those applications weren't granted?

A. Yes sir.

Q. Did you also make a new application with United Artists and Columbia?

A. Not that I recall, no sir.

Q. With reference to the applications for Metro did you tell the Metro salesman that you would be unable to make a new contract unless some concessions were made on the old contract?

[fol. 781] A. I think that I made some statement like that, yes sir.

Q. Did you also say that even on a new contract you couldn't pay the same film rental as you had previously paid because Mr. Sudekum's opposition had taken some of your business away?

A. I think I made a remark like that, yes sir.

Q. Well, that was true, wasn't it? I mean you weren't able to pay the same prices that you had been paying?

A. No sir, I couldn't have paid it and continued, I don't believe.

Q. And you knew that the reason Metro was selling the product to the Crescent Amusement Company was because the Crescent was paying higher prices for it than you could afford to pay?

A. No.

Q. You didn't know that?

A. No. It was to the contrary.

Q. Then what did you know about it?

A. Nothing other than hearsay.

Q. You had intermittently, I believe you said, bought Paramount products?

A. Yes sir.

Q. Did you have a contract for the 1934-1935 season—is that one of the contracts that was produced there?

The Court: That is one.

[fol. 782] By Mr. Waller:

Q. You didn't have a contract the previous year?

A. I don't believe I did.

Q. Your contract for 1934-1935 was based on playing some of the previous year's product?

A. It was for the year's release of pictures but it was out of two years. In other words, I had the privilege of playing whatever the total number of pictures was out of two years' product.

By the Court:

Q. You mean out of the 1933-1934 1934-1935 pictures?

A. Yes sir.

By Mr. Waller:

Q. Did you have the same situation as to Paramount for the next year, that is to say, you couldn't pay the same rentals that you had been paying?

A. I didn't understand the question.

Q. I say did the same situation exist in regard to Paramount product with you, namely, that you couldn't afford to keep on paying for those pictures what you had previously paid?

A. I don't recall that coming up. It would have been the same, I believe, yes sir.

Q. What about the Warner Brothers contract? Did you play those pictures off in accordance with the contract?

[fol. 783] A. I believe that I did, yes sir.

Q. Would you have been able to have paid the same prices for the Warner product?

A. You mean the same price that I had paid——

Q. Previously?

A. —the last contract I had with them?

Q. Yes sir.

A. I think that I could have, yes sir.

Q. Now, why was it you could have paid the same prices for Warner but couldn't for Paramount or Metro?

A. Well, I don't know that I have any answer for that. I do believe Warner Brothers was a little more equitable than the other contracts. I don't recall the exact figures though.

By the Court:

Q. You mean a little cheaper price?

A. Yes sir.

By Mr. Waller:

Q. Well, all pictures are different, aren't they? In other words, one picture is worth more than another picture and the product of one company may be worth more one season than another season?

A. I never had that opinion about it as far as seasons are concerned except in some rare instances. I wouldn't say that with the bigger companies there would be much difference in them, if any.

[fol. 784] Q. Well, the product of one company sometimes is different from the product of another company insofar as the box office appeal is concerned?

A. Yes sir.

Q. After the Crescent Amusement Company started its theatre in Brownsville you say you then put up a tent show in Paris?

A. Yes sir.

Q. Why did you do that?

A. To make a living.

Q. Now, there was already a good theatre in Paris, was there not?

A. As far as I know, it was a good theatre, yes sir.

Q. When you ceased operating the tent show you got a store building there and put a theatre in it?

A. Yes sir.

Q. A somewhat similar situation to what you had done in Brownsville?

A. I would say a very similar operation, yes sir.

Q. Was it your idea then that you might be able to sell out to the Crescent Amusement Company?

A. I had never had any thought of selling out to the Crescent Amusement Company.

Q. Not even in Paris?

A. No sir.

[fol. 785] Q. Of course, you knew the Crescent Amusement Company had been operating a theatre in Paris for a long time?

A. Oh yes.

Q. And you thought it was your privilege, notwithstanding that fact, to start a theatre in opposition to them in Paris?

A. Well, I had often thought about Paris previous to their coming into Brownsville but I would not have encroached on Mr. Sudekum, knowing the reputation that they had of doing business, etc.

Q. When you went into Paris, I believe you stated you got Fox pictures, did you not?

A. Not at the first; no.

Q. When was it you opened your theatre in Paris?

A. In the building?

Q. Yes.

A. I believe it was about the first of November, 1935.

Q. How long was it before you got Fox pictures?

A. That I couldn't say, off hand.

Q. Did any representative of Fox suggest to you that you might open a theatre in Paris?

A. No sir.

Q. Didn't tell you that if you did you could get Fox pictures there?

A. Not that I recall, no sir.

[fol. 786] Q. Well, in any event the delay was very slight in getting the pictures, wasn't it?

A. No sir. It seems to me like it was quite some time after I went in the building before I got Fox pictures. I could be mistaken about that.

Q. Now, I believe you said you used what other product in Paris?

A. Paramount.

Q. Any RKO?

A. Some RKO, yes sir.

Q. Now, you went to Memphis trying to get second run pictures from other companies, did you not?

A. Yes, sir.

Q. Whom did you see that represented Warner Brothers in Memphis about getting second run pictures from Warner Brothers?

A. Mr. Adams, I believe at that time.

Q. Do you remember when it was that you saw Mr. Adams?

A. That I don't, no sir.

Q. Whom did you see that represented Columbia in Memphis about getting second run Columbia pictures?

A. Mr. Haines and Mr. Rogers.

Q. Did you write to either of those gentlemen?

A. I don't recall writing the-, no sir.

Q. Whom did you see that represented Universal about [fol. 787] getting Universal second run pictures?

A. I don't think I made any application for Universal pictures in Paris. I understood that they were sold up there possibly on a franchise; I don't recall.

Q. What did the Columbia representative tell you when you made application for second run pictures?

A. They sold me some first run pictures that Mr. Sudekum didn't have under contract up there.

Q. Did they refuse to sell you any second run pictures?

A. I have a very vague memory about that. As a matter of fact, I don't know that I recall definitely about asking for second run Columbia.

Q. Now, which companies did you definitely ask for second run pictures?

A. I believe that would be impossible for me to answer except that I possibly went into all of them and asked them if it would be possible to get second run pictures for Paris and they had all about the same answer; that they either wouldn't care to take a contract or that Paris was too small for second run operation.

Q. You say you possibly did that. Do you mean from your recollection at this time it is possible that back in 1935 you did those things?

A. Well, it is customary to call on all the companies and [fol. 788] make every reasonable effort to get product for the towns, yes sir.

Q. I say you are basing your testimony about that on what is possible or what was customary and not on any actual or definite recollection?

A. Well, it would be very vague as far as the definite part of it is concerned.

Mr. Waller: Now, if your Honor please, in view of that, I think we are entitled to have that testimony stricken about the second run pictures on direct examination.

The Court: Well, it is not a question of whether it is competent. It is a question of what weight the Court will give to it.

Mr. Waller: It may be a question of weight.

By Mr. Waller:

Q. What was the seating capacity of your theatre at Paris, Tenn.?

A. Around three hundred seats.

Q. Now, you were renting, I believe, or leasing both at Brownsville and at Paris?

A. Yes, sir.

[fol. 789] Q. You said something on direct examination about having made your home in Brownsville; I don't recall whether I asked you; you did have a place there at Brownsville?

A. Yes, sir.

Q. And did you own a home?

A. Rented it.

Q. Rented it? And from Brownsville you moved to a place in Mississippi?

A. No, sir, I didn't move to Mississippi.

Q. You continued to live in Brownsville?

A. Yes, sir.

Q. And operated a place there?

A. Aberdeen, Mississippi.

Q. Then, when was it you left Brownsville?

A. Well, I left about two weeks after going to Aberdeen and went back to Charlotte.

Q. And you have made your home in Charlotte since that time?

A. Yes, sir.

Q. While you had this theater in Brownsville, did you have any other theaters; I mean, before you started the tent show in Paris?

A. Yes, I had operated a little place in Alamo, Tennessee with some tent show equipment, during the fall.

[fol. 790] Q. Well, did you have a place at Whiteville, Tennessee?

A. For a month or two, yes, sir.

Q. When was it you had the place in Whiteville?

A. I couldn't recall about that.

Q. Was that a tent show?

A. No, sir.

Q. Well, you had all three of these operations at the same time, did you not? I mean the one month that you operated the theater at Whiteville was also at the time you were operating at Brownsville and Alamo?

A. I believe that it was, yes, sir.

Q. Did you play pictures at Alamo or Whiteville which you had bought for Brownsville?

A. Yes.

Q. What were the circumstances?

A. I couldn't recall, except that I could place some bigger pictures over there and cancel some of the lesser pictures from the Brownsville contract.

Q. Did you ever do that without the permission of the owner of the copyright?

A. No, sir, not on feature pictures.

Q. Well, did you on anything else?

A. Yes, sir.

Q. What happened about that?

A. I settled with the copyright bureau about that.

Q. Then you did have some trouble with the copyright bureau?

[fol. 791] A. Yes, sir.

Mr. Frolich: No cross.

Re-Direct examination.

By Mr. Wright, for the Plaintiff:

Q. How big is Alamo, Tennessee?

A. To the best of my recollection, it has about 600 or 700 people.

Q. How big is Whiteville?

A. About the same size.

Q. Well, Whiteville is bigger than Alamo?

A. Well, I am of the opinion it is, yes, sir; I don't know the official population.

Q. Now, Mr. Lawing, if you had been able to continue the license of the Paramount, Metro and Warner features you would have sold your theaters in Brownsville for more than at the time you did?

Mr. Waller: We object to that.

The Court: Sustained.

Mr. Wright: That is all. I don't believe I have offered all these exhibits in evidence. I would like to do so now. [fols. 792-793] The Court: All right; any objections to these particular exhibits, gentlemen?

Mr. Armistead: No, sir.

The Court: All right; let them be put in evidence.

Mr. Wright:

Q. You are doing business with both the major film distributors, are you not, in your theaters around Charlotte?

Mr. Waller: We object to that, as immaterial.

Mr. Wright: I thought perhaps it was not a satisfactory account and I just wanted him to point that out.

The Court: Well, one of those distributors in there said it was mighty satisfactory. Sustained. Of course, if they make any question about that I will let you put in evidence in rebuttal. I don't see any reason for it yet.

And further this deponent saith not.

[fol. 794] E. W. Dozier, Called as a witness in behalf of the Plaintiff, he having been first duly sworn, testified as follows:

Direct-examination.

By Mr. Simon:

For the Plaintiff:

Q. Will you tell the reporter your name, please? What is your name and where do you live?

A. My name is E. W. Dozier, and I live in Madisonville, Kentucky.

Q. What business are you in, Mr. Dozier?

A. I am in the real estate business, just at this time.

Q. Have you ever been in the theater business?

A. Yes, sir.

Q. You have operated theaters?

A. Yes, sir.

Q. Will you tell us where you have operated theaters?

A. At Madisonville, Kentucky and at Earlington, Kentucky.

Q. During what period did you operate theaters in Madisonville, Kentucky?

A. During the fall of 1916, until January 1st, 1932.

Q. Were you a partner of the Crescent Amusement Company in that operation at any time?

A. Yes, sir, I was for a while.

[fol. 795] Q. During approximately what period?

A. Well, in 1930 and 1931.

Q. During the period you were associated with Crescent in Madisonville, did you ever have any discussions with Mr. Sudekum with regard to Earlington, Kentucky?

A. Yes, sir.

Q. Will you tell us what discussions you had with him?

A. Well, the theater was closed at that time over there, and I spoke to him a time or two, thought that probably we should buy that place over there and open up a theater over there; it was a town with a big Western Coal Company that had a lot of employees there, and I thought it would be a good town to open up a theater in.

Q. What did Mr. Sudekum say?

A. He said it was too small a town; that his experience in these smaller towns was it didn't do any good.

Q. What was your experience in the theater, how did it terminate, did they buy you out?

A. Yes, sir.

Q. Have you a copy of the agreement under which you sold your interest in the Madisonville theater to Crescent?

A. No sir; I didn't find it in my file.

Q. Do you recall the provisions of the agreement in Madisonville, in effect?

[fol. 796] A. Yes, sir.

Q. Can you tell us in substance what the provisions were?

A. Well, it was that I should stay out of the town for ten years.

Mr. Simon: I wonder if the defendants could furnish a copy of that agreement?

Mr. Armistead: I don't know whether we have it or not.

Mr. Simon:

Q. Can you tell me what the approximate population of Madisonville is?

A. Something between eight and ten thousand.

Q. Do you know if that was the approximate population of Madisonville in 1935?

A. That was near it, yes, sir.

Q. Well, what was the approximate population of Earlington, Kentucky?

A. About 3200.

Q. And do you know how large Earlington was in the year 1935?

A. Well, there wasn't much difference; it was about the same.

[fol. 797] Q. How far is Earlington from Madisonville?

A. Between three and four miles.

Q. And there is a highway connecting the two towns?

A. Yes, sir.

Q. Is that highway paved?

A. Yes, sir.

Q. Was it paved in 1935?

A. Yes, sir.

Q. Is there more or less of a free interchange of traffic between Earlington and Madisonville?

A. Yes, sir.

Q. Can you tell me what you did after you sold your interest in the Madisonville Theater, as to Crescent?

A. Well, of course, I had been in the theater business for the last 15 years, so I decided I would go over to Earlington and open up a theater over there.

Q. What was the name of the theater you opened up there?

A. Roxy.

Q. Was there any theater in the town when you came in with Rockwood?

A. No, sir.

Q. There had been previously operated a theater there?

A. Yes, sir.

Q. But it was closed?

[fol. 798] A. It was closed.

Q. How many seats did the Roxy have when you operated it?

A. Between 500 and 600; I don't know exactly.

Q. How long did you operate the theater, the Roxy Theater, in Earlington?

A. I opened it May 12, 1932 and sold it August 1, 1939.

Q. And who did you sell it to?

A. To the Crescent Amusement Company.

Q. Was the Roxy the only theater operating in Earlington during that entire period of 1935-1939?

A. No, sir. The Crescent Amusement Company opened up the Earl in the Spring of 1937—I think it was in April, 1937.

Q. And is it true that from that time until you sold it to Crescent Amusement Company there were two theaters operating in Earlington, Kentucky?

A. Ask the question again.

Q. I asked if it was true that from the time the Earl Theater opened until you sold out to the Crescent Amusement Company there were two theaters operating in Earlington?

A. Yes, sir.

Q. Did those two theaters continue to operate after you sold out to Crescent?

[fol. 799] A. No, sir, they closed one of them.

Q. Which one was closed?

A. Well, they operated the Roxy, the theater they bought from me, for a while; and the theater they had built there was down town, and the business men petitioned them to close the Roxy and open the Earl; they did that; they opened the Earl.

Q. How long after you sold out to Crescent was the Earl Theater closed?

A. I would say 60 days; that might be more or less; I don't know exactly.

Q. Do you know Mr. Kermit Stengel?

A. Yes, sir.

Q. How long have you known him?

A. Between two and three years; I don't know just the exact time.

Q. Do you remember the first occasion on which you met him?

A. Yes, sir; I remember the occasion, but I didn't meet him and talk to him; I don't know whether I had casually met him before or not.

. . . . . .

[fol. 800] Q. In what year did this occasion you have in mind occur?

A. Well that occurred in the fall of 1936.

Q. Where was your conversation, where did your conversation take place, with him?

A. In his office here in Nashville.

Q. In his office here in Nashville?

A. Yes, sir.

Q. Did you come to see Mr. Stengel?

A. Yes, sir.

Q. Why did you come to see him?

A. Well it had been orated around that they had taken an option on a lot in Earlington to build a theater on.

The Court: You said what, it had been orated?

A. It had been talked.

The Court: Some of these folks from the East might not understand that language.

Mr. Simon: Will you tell us what conversation you had with him on that occasion?

A. We came down in the morning, we, or I really came down to see Mr. Sudekum, but he was busy, and after we exchanged a few words with him, he turned us over to Mr. [fol. 801] Stengel, and I talked with Mr. Stengel. First I asked if they had an option on a lot over there, and he said they did, and I asked him why he didn't just let Earlington alone, it was just a small town over there, and Mr. Sudekum at one time before refused to come in there when we were in partners there, and I had a very nice business over there and that was not sufficient business for two theaters, why they did not just let me have that town over there and not bother me coming in over there. And he said that they had made up their minds to come up there, that they were coming in there, see, and then I talked to him about if he was going to come in there, even though I didn't want to sell, lease or anything else, but if he was coming in, realizing there was not enough busi-

ness for two theaters, and the difference in the buying power they had over me, I would like to sell my theater.

Q. And what did he say to that?

A. Well he said that he didn't think that they would want to buy it, but they might lease it, so we talked on that line, and I told him I didn't want to lease it, if I did anything, which I didn't want to do, I would sell it.

Q. When was the next occasion you saw Mr. Stengel?

A. Well I saw him at my office in Earlington.

Q. About how much later?

A. Well it was some time after that was the date, but [fol. 802] a short time because he told me when he left he would talk it over with Mr. Sudekum and come to see me, or come on some occasion, so the next meeting with him was at my office at Earlington, Kentucky.

Q. Can you tell us what conversation took place on that occasion?

A. He said they had been thinking this thing over and he would not buy it, but he would talk lease to me, and at that time I tried still to talk him out of coming into the town, let me alone, go ahead with what they had in Madisonville, and let me run in that little town; and he said, no, they were going to come into the town, if they could lease it off me they would call it a lease, and they would work out a lease with me, and if they couldn't they were going to buy that lot and build on it.

Q. Did you tentatively work out the terms of a lease on that occasion?

A. Yes, sir.

Q. What kind of terms did you agree upon?

A. We agreed upon a ten year lease with a privilege of ten more, at a hundred and eighty-five dollars for the first ten years and a hundred and fifty for the second ten years.

Q. How did the conference end?

A. Well after we had talked it over from every angle, why [fol. 803] then he left for Nashville and told me to get up a lease along the lines of our conversation, which I did, —I had it gotten up and submitted to him.

Q. Did you offer it to him?

A. Yes, sir.

Q. Did you subsequently enter into that lease with the Crescent Amusement Company?

A. No, I didn't enter into it?

Q. Why not?

A. Well the understanding was that he told me at that time it was the Rockwood Amusement Company that was leasing it and of course, I didn't have any information on the Rockwood Amusement Company, only what he said, he said that Mr. Sudekum, and I knew Mr. Sudekum, and he told me that Mr. Sudekum owned it, but it was a corporation, the way I understood it and of course too I wanted a financial report on it before I entered into any lease with them. So some time later he did furnish me with a financial report, after I had sent in the proposed lease and the financial report didn't show, didn't warrant me in leasing the property to them anyway from the information we could get from it, you see, it was a very meager financial report.

Q. Did you subsequently notify Mr. Stengel that you [fol. 864] had changed your mind about leasing the theater?

A. Yes, sir, after I received that financial report I notified him that I did not wish to go ahead with it.

Q. Do you know approximately when you notified him of the withdrawal of the lease?

A. Well it was getting up about the seventeenth, between the seventeenth and the twenty-fifth of December—of January—no, between the seventeenth and the twenty-fifth of December.

Q. Of what year?

A. 1936.

Q. Then did you notify Mr. Stengel that you were no longer interested in dealing with them, did you have any further conversation with him?

A. Yes, sir, he came right up I think now the next day after he received that.

Q. Where did this conversation take place?

A. In Madisonville.

Q. Whereabouts in Madisonville?

A. In the lobby of the Hotel Madison.

Q. Was there any one else present?

A. No, sir.

Q. Will you please tell us what conversation you had?

A. He insisted on going ahead and making this lease, and I told him that I didn't figure from the financial statement [fol. 805] that it was to my interest to make the lease, without Mr. Sudekum personally or the Crescent Amusement Company personally would sign that lease, I said it would

not do, see, this was the Rockwood Amusement Company, but they would not do that, see, and I told him then that there wasn't a chance for me to make the lease on it. I also told him at that time that, which I tried to do before, that I would sell it to him outright if the Crescent Amusement Company, or Mr. Sudekum either one would sign the notes, see, for sixteen thousand dollars, two thousand dollars down, down payment, and name his terms on the balance. He would not agree to that at all and finally we had a pretty abrupt ending. He said that if I didn't sell, not didn't sell, if I didn't lease it, he would build in Earlington, but the Crescent Amusement Company which had the money to build and that they might buy and build over there, and put me out of business. So that was about the end of the conversation.

Q. And the Earle theater was opened in Earlington after that?

A. Yes, sir.

Q. When did you finally sell the Roxy theater to the Crescent Amusement Company, who did you negotiate the deal with?

A. With Mr. Sudekum and Mr. Baulch, I talked with both [fol. 806] of them.

Q. Where did those negotiations occur?

A. In Nashville here.

Q. Did you come to see them about selling?

A. Yes, sir, I did.

Q. When did you first approach them to talk about selling?

A. Well it was some time in July, June or July of 1939, see, it was to take effect as of August first, 1939.

Q. Will you tell us what conversation you had with Mr. Sudekum when you first approached him?

A. Well I came down to see him and tell him that I wanted to sell out to get out of the picture show business, because it had gotten to where I could not get product, and that there was just not sufficient business in the town for two theaters, but if they would buy out at a reasonable price, I would sell to them. When it gets to where you can't get sufficient pictures, regardless of the building you have, it is time to get out, so I just negotiated the best deal I could with them and sold.

Q. What was the deal you negotiated with them?

A. They paid me seven thousand dollars for it.

Q. Was there another town that was related to that field?

A. Well we had a lease agreement on the Alhambra theater in Hopkinsville, which was operating that theater.

Q. Who was operating that theater, then.

[fol. 807] A. Crescent Amusement Company.

Q. You were leasing it to them?

A. Yes, sir.

Q. How did that theater enter into this deal with the Roxy theater?

A. At the time he was here he asked me about the Alhambra theater, buying our lease and equipment down there, and my wife and I only owned a half interest in that, and my brother, and my brother who was not interested in the other theater, owned the other half, so I told them at that time I did not know whether they wanted to sell that, I would have to talk that over with my brother, and they told me they would not be interested in buying one without they bought the other theater there. So I did go back and talk to my brother and we sold it, with the equipment and lease on the Alhambra at Hopkinsville.

Q. Would you have sold that lease on the other Alhambra theater at Hopkinsville, unless you had sold the Roxy theater?

Mr. Armistead: We object to that.

The Court: Objection sustained.

Mr. Simon:

Q. Do you have a copy of the agreement you entered into [fol. 808] when you sold out the Roxy theater?

A. No, I haven't, they gave us a copy, but I was out I didn't look after it.

The Court: Let me ask you a question right there. This Seven thousand dollars, did that cover both deals, the Alhambra building and the other?

A. No, sir, the Alhambra deal was eighteen thousand dollars for the equipment down there, and seven thousand dollars for the Roxy.

Mr. Simon:

Q. Seven thousand dollars for the Roxy?

A. Yes, sir, seven thousand for the theater at Earlington, and eighteen thousand dollars for the Alhambra.

Q. At Hopkinsville, is that right?
A. Yes, sir.

[fol. 809] The Court: That is lease and equipment?

A. Yes sir. We just figured it out from an insurance proposition, I had an insurance company to figure the value of it for me and that is the way we arrived at the value of the Alhambra.

Mr. Simon:

Q. I didn't get that last?

A. I had the Alhambra lease and equipment; had an insurance company figure so much a month, so many years, that is the way the lease was, that is the way we arrived at the value of that lease.

Q. Did the agreement that you entered into with the Crescent Amusement Company for the Roxy Theater in Earlington contain any provision with regard to your operating other theaters in Earlington?

A. Yes.

Q. Do you recall the substance of those provisions?

A. Well, it just prohibited us from entering into or operating a theater in Hopkins County and I believe that lease or that contract covered any town where the Crescent Amusement Company was operating. I am not positive about that. I think that is right.

Q. Do you recall for what period?

[fol. 810] A. For a ten-year period.

Mr. Simon: I wonder if we could have a copy of that lease?

Mr. Armistead: We are not objecting because you haven't the original.

Mr. Simon:

Q. I would like to ask you if you had any fire in the Roxy Theater in the year 1936, or 1937?

A. Yes sir, we had a small fire in our booth there when a film caught fire one night while the second show was operating.

Q. Do you recall in which year that was?

A. I believe it was in 1936.

Mr. Armistead: May I ask what the purpose of this is. Is it claimed the Crescent had anything to do with that fire?

Mr. Simon: Oh no, it isn't claimed they had anything to do with the fire, but I think it will appear later that certain contracts were entered into with Crescent on account of the fire that occurred in that theater and we are trying to develop through this witness whether there was a fire in the theater.

Q. I didn't get your answer to the question?

A. I believe the fire was in 1936, I am positive about that.

Q. Was the theater closed down for any period of time on account of that fire?

[fol. 811] A. For just a short time. I knew we made a trip to St. Louis and Indianapolis to get the equipment and open it up again and it was just a short time.

Q. Was it more than a week?

A. I believe it was about ten days or two weeks, that is near the time.

Q. Do you recall in what part of the year 1936 that occurred? Was it during the period when you were negotiating with Mr. Stengel for the lease of the theater?

A. I believe it was, but I wouldn't be able to say whether that was before the original negotiations with Mr. Stengel or whether it was between that time, I am positive that is correct though, it was before that time.

Q. You think it was before the negotiations with Mr. Stengel ever occurred?

A. Yes sir.

Q. During the first year that you operated the Roxy Theater did you show any pictures before Madisonville?

A. Yes sir.

Q. Did you show any pictures after Madisonville?

A. I don't recall one; I don't think so.

Q. During the second year that you operated the Roxy Theater did you show pictures before Madisonville?

A. Yes.

[fol. 812] Q. Did you also show pictures after Madisonville?

A. I don't think so. I never showed a picture after Madisonville unless it was absolutely necessary for us to get the products.

Q. Was it necessary to do that in the second year that you operated the theater?

A. No sir, it wasn't.

Q. During the 1932-1933 and 1933-1934 seasons, did you exhibit Paramount pictures?

A. Yes.

Q. Did you exhibit them ahead of Madisonville?

A. Yes sir—May I correct a statement back there, about second run pictures? I believe the second year I was there I showed some Metro-Goldwyn pictures following Madisonville, because they bought them away from me and I think I did show some Metro-Goldwyn pictures for second run.

Q. I want to ask you if, in your experience, you find it more profitable to play pictures before Madisonville, or after Madisonville?

Mr. Raftery: We object to that as speculative.

Mr. Simon: This man has had experience. I am asking him about pictures he actually played.

A. Very much more profitable to play them ahead of Madisonville.

Q. To do what.

A. To play them before Madisonville.

[fol. 813] Mr. Simon: I would like for this to be marked as Government's Exhibit P—Whatever the next number is.

(Document marked Exhibit P-16.)

Mr. Simon:

Q. Mr. Dozier, I would like to show you Government Exhibit No. P-16 and ask you if this is the contract you entered into with Paramount Pictures Corporation for their pictures for the 1935-1936 season?

A. Yes sir.

Q. Did you enter into that contract on or about the date it bears?

A. Yes sir.

Q. Who was the salesman with whom you negotiated that contract?

A. Mr. Newman, Mr. Duff Newman.

Q. Now, I would like to call your attention to the clearance provision in that contract where it says: "Subject to final decision of Indianapolis Clearance Board."

Mr. Rafrety: That is the NRA Clearance Board, is it, that phrase looks like that.

Mr. Simon:

Q. I would like to ask you if at the time you entered into that contract you had any discussion with Mr. Newman [fol. 814] about that clearance clause in relation to Madisonville?

Mr. Armistead: The contract speaks for itself; the contract provides that it contains all the terms of the agreement.

Mr. Simon: It is our contention that that contract does not speak for itself, that it is very vague and indefinite and there was an oral understanding which I believe will be supported by correspondence that we are later going to introduce as to whether or not there was to be clearance over Madisonvile under that contract.

The Court: Well, what does the contract say about Indianapolis? Is that a Clearance Board?

Mr. Simon: That is right.

The Court: How is that indefinite?

Mr. Simon: Well, I think there was an understanding as to what the Indianapolis Clearance Board was to decide. I don't want to testify for this witness, possibly we should ask the witness to leave the room, but there was some discussion as to whether or not, under that contract, the exhibitor was to play before or after Madisonville, and if so, the clearance that one town was to hold over the other, and none of that appears in the contract, though I believe it is borne out by correspondence that we are going to intro- [fol. 815] duce, and we would like to get the conversation that this witness had at the time the contract was negotiated.

Mr. Waller: If all that is true, he has just got a breach of contract suit with that company and it doesn't belong in this case. We submit it is irrelevant, as well as the other objection.

Mr. Simon: We are not trying to try Mr. Dozier's breach of contract case for him, if he had one. We do intend to show instead of entering into a contract with Mr. Dozier which called for him to play pictures ahead of Madisonville, he did not play pictures ahead of Madisonville but rather behind them, because of the subsequent contract that Paramount entered into with Crescent Amusement Company.

Mr. Waller: That contract doesn't call for him to play pictures ahead of Madisonville.

Mr. Simon: I think that is right, I think if you will look at the contract itself, you couldn't be sure what it calls for, but this oral understanding they had with the salesman was to this effect, that he was to play—Stop me if you don't want me to go ahead, your Honor, because I don't want to testify for the witness.

The Court: Go ahead, that is all right.

[fol. 816] Mr. Simon: The oral understanding, as I get it, that he had with Newman, Paramount's salesman, was, that he was distinctly to play ahead of Madisonville but the question of how many days ahead of Madisonville he was going to play, in other words, what clearance he was to have over Madisonville, was to be determined by the NRA Clearance Board of Indianapolis, but in spite of that, a few months later, they sold——

The Court: Do you have written evidence in the form of correspondence to that effect?

[fol. 817] Mr. Simon: Well, we don't have anything that expressly says that but we have written correspondence between Mr. Dozier and Paramount calling Paramount's attention to the fact that Madisonville has been sold to run ahead of Earlington, and later we have the superseding contract that Paramount entered into with Mr. Dozier definitely providing that it was following Madisonville and reducing his film prices about seventy five per cent, I believe, conclusively indicating that the prices that he charged when they entered into this contract were prices for showing ahead of Madisonville, in other words, first run showing, however, for the three preceding seasons Mr. Dozier had been showing Paramount pictures ahead of Madisonville because during those three preceding seasons Madisonville had not been buying Paramount pictures and they had played some spot booking products and played them after Earlington.

The Court: Well, we will determine that matter after lunch. Adjourn until 1:30 for lunch.

Thereupon a recess was taken for lunch.

[fol. 818] Afternoon Session

The Court: Gentlemen, I don't know whether the plaintiff or the defendant subpoenaed Mr. S. B. Ford of the Star Theatre at Lexington, Mississippi but I have a letter from Dr. Stevenson saying he is very ill and in addition to that, he is seventy years old and deaf.

Mr. Dobey: He was a star witness for the Government, your Honor.

The Court: Mr. Simon, is it the contention of the Government that the question of clearance was not settled by the Board at Indianapolis?

Mr. Simon: That is right. As far as Mr. Dozier knows, there was never any hearing on the matter in Indianapolis. That contract was signed at the end of April, 1935, and, as your Honor knows, the NRA was declared unconstitutional about thirty days later and the Board all broke up as soon as NRA was declared unconstitutional.

The Court: Of course, that wasn't contemplated by either the salesman or the operator at that time. Now, what is it you wish to prove, certain statements made by the sales-
[fol. 819] man?

Mr. Simon: We wish to prove the conversation that Mr. Dozier had with the salesman indicated both of them understood by that clearance provision that all the Indianapolis clearance board was to decide was how long after Earlington Madisonville or any other town in that vicinity was to play under that contract ahead of Madisonville, Kentucky.

Mr. Raftery: Are you stating accurately about that clearance board? Wasn't the clearance set up by this NRA board at Earlington to play ahead of Madisonville? Wasn't the larger towns set up with clearance over the smaller towns? That is the way they operated. That is the way the board operated. I am not trying to defend these boards but I am just trying to point out the way it was done.

Mr. Simon: I think, your Honor, that the contract doesn't say anything really about the towns over which Earlington is to take clearance. It just says that clearance is to be subject to the decision of the Indianapolis clearance board.
[fol. 820] The Court: What does the Government propose to show actually happened in connection with the clearance?

Mr. Simon: We propose to show that at a subsequent date, sometime in August of 1935, Paramount entered into a contract with the Crescent Amusement Company for their theatre at Madisonville and at the same time for other theatres in the Crescent circuit and that that contract gave Madisonville clearance over Earlington and as a result of that Mr. Dozier was unable to play Paramount pictures during that season of 1935-1936 ahead of Madisonville but instead had to play them after Madisonville, and then later on, about four months after the Crescent contract in De-

cember Paramount adjusted Mr. Dozier's contract by entering into a superseding contract with him, decreasing his film rentals that he was going to pay. Now, it seems that that indicates what the parties had in mind when the first contract was executed was that Mr. Dozier was to pay these higher rentals for the privilege of playing first in that vicinity, and then when they sold Madisonville ahead of them they naturally had to reduce the film rentals because obviously he couldn't afford to pay those high rentals and still play after Madisonville. Those rentals were just about [fol. 821] what Madisonville payed for the privilege of playing ahead of Earlington.

Mr. Armistead: I withdraw my objection.

Mr. Raftery: I haven't any objection or I would withdraw it.

The Court: Now, just a minute before proceeding with this witness. I stated Friday that I would rule today on the question of the admissibility of certain evidence pertaining to bank nights, hot seat nights and amateur nights, I believe, instituted by the Crescent Amusement Company in connection with the operation of the Gallatin Theatre. I am not entirely prepared at this time to make a definite ruling on that proposition in view of the fact that I have already ruled once, and I would like to give counsel the benefit of what the Court has in mind so that I can hear from counsel on the legal proposition. Clearly the question involved in that matter is one of the important and decisive questions to be decided in this case.

It appears to the Court that the exhibition of motion pictures is purely a local matter and the question of competing theatres, building finer houses and having finer equipment, [fol. 822] reducing prices, bank nights, amateur nights, hot seat nights, advertising, etc., that is purely a local matter and purely a local proposition.

Now, if the Crescent Amusement Company had obtained a large number of theatres and went into a town and opened up a new theatre and used all of those methods for the purpose of eliminating competition of any theatre that was running in the town at that time, that would be purely a local proposition, it appears to the Court, and not a violation of the Sherman Act, but when it comes down to the proposition of the Crescent Amusement Company through or rather on account of the fact that it did operate a large number of theatres and through agreements and dealings

with the distributors secured all the first run pictures to show at their theatres, resulting in the competing theatres being unable to obtain those pictures, that is an entirely different proposition. That does involve or affect interstate commerce in procuring and shipping those pictures.

Now, I have gone into these cases again, the case of Foster & Kleiser vs. Special Site Sign Company. In that case Foster & Kleiser were operating billboards, signs, and oper-
[fol. 823] ating them in several states and shipping materials from one of their agencies or stores or departments in one state to other states, and the court held there was no competition in that; that they were just shipping to themselves but on the other hand it was urged that they procured signs and lithographs and posters from companies outside of the state and that in those operations interstate commerce was involved. Now, Foster & Kleiser were charged with certain acts of procurement of sites for billboards, and preventing other competitors from obtaining sites, unfair and discriminatory prices, cutting prices to induce competitors' customers to break their contracts with competitors, priorities, rebates, and other methods. The Court said: "All the means alleged to have been used for the carrying out of the conspiracy were adopted to the injury or destruction of plaintiff's business in its intrastate aspects. None are alleged to have directly affected interstate trade in posters or lithographs." In other words, they didn't keep their competitors from obtaining posters and lithographs from outside the state. The only reason they did that, they didn't have any use for them because they couldn't get any sites for their billboards.

[fol. 824] "Neither the allegations of damages nor the allegations of acts of conspirators in inflicting the damage are in any way related to the allegation as to a conspiracy to restrain trade and commerce in posters and lithographs."

Well, here the allegations and the theory of the Government is that trade and commerce are restrained by the fact that competing companies with the Crescent Amusement Company couldn't get pictures, which were shipped in interstate commerce.

[fol. 825] The Court (Continuing): What is the paragraph relative to the Bank Nights?

Mr. Waller: Paragraph 54.

The Court: Also, in the Bodman Dairy Co. case vs. C. & C. Ice Cream Company, it is stated there that while the bulk of the raw ingredients used by the parties in the manufacture of ice cream came from Kentucky, the flavoring and part of the milk came from outside of the State, it is not shown that appellant company has shown any reduction in the monopolization of these supplies, that is, the supplies it received in interstate commerce for the manufacture of this ice cream. That is the theory of the Government in this case, that there was a monopolization in the supply of films that came into these theaters. We do not regard the transactions of the nature that during the three years here involved more than 90 per cent of the product was sold in Kentucky, and that which was sold outside of Kentucky was distributed through independent dealers and not through independent stores. All the ice cream sold in this price war was sold in Louisville and, Jefferson County, [fol. 826] Kentucky. We don't regard the transactions complained of as creating a direct and substantial burden on interstate commerce. The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sale through retail stores was entirely of a local nature." Of course, if a man operated a picture show in a small town where there was another picture show, and had clearance provisions in his contract; it might be said that that would not be a burden on interstate commerce, because it did not have the effect of keeping competitors from securing films on account of the fact there were no competitors. And then, too, where there are two towns close together there may be discriminations in favor of one independent operating in one town against an independent operating in another; and a situation is presented that it might be said that, Well, that is just a question of one independent trying to make the best deal he can, so he can show pictures before the other small town close by can show them, not for the purpose of eliminating competition, or not for the purpose of driving that independent in the nearby town out of business. I think the purpose and intent of these agreements have considerable to do with the legal question, and of course where the operations are on such a large scale [fol. 827] with such a large number of picture shows, it is a very serious question as to whether or not it does not affect interstate commerce competitors from securing films. You

make an allegation in the original bill that the methods adopted by the defendants, in giving away large sums of money prizes, and so forth, was a part of a conspiracy to restrain trade and commerce?

Mr. Dobey: I think that is true, if your Honor please. If you will notice, paragraph 45 says to combine to restrain interstate commerce in the operation of motion picture theaters in the following manner: and then follows the rest of the complaint.

Mr. Waller: Perhaps your Honor will recall that before, that Mr. Sherer, who was here on the motion, in regard to paragraph 54, he was asked if it charged that the distributors had anything to do with Bank Night and so forth, and he expressely stated that the Government did not contend that was a part of the conspiracy.

Mr. Dobey: We also charge a conspiracy between the exhibitors themselves to restrain interstate commerce in [fol. 828] motion picture films, without regard to whether there is any conspiracy of the distributors in that respect.

The Court: Paragraph 45 says the defendant exhibitors have combined with each other and with each of the defendant exhibitors unreasonably to restrain trade in interstate commerce in motion picture films.

Mr. Dobey: The first conspiracy is continually combining with each other and with each of the conspirators; a conspiracy among themselves and also a conspiracy between them and each of the distributors.

The Court: And to monopolize or attempt to monopolize the exhibition of motion pictures, in the operation of motion picture theaters in the present towns and in the other towns in Tennessee, Arkansas, and Mississippi, in violation of section 2 of the Sherman Act, in the following manner." I suppose "in the following manner" would carry us to Paragraph 55, down to the prayer of the bill?

Mr. Dobey: I think that is true, they were; and in addition to——

[fol. 829] The Court: There are a lot of periods in there.

Mr. Waller: And they start again in paragraph 50, "in the following manner," all over again.

The Court: Combine with each other and with each of the defendant exhibitors, and so forth, to monopolize, or attempt to monopolize, the exhibition of motion pictures in the operation of motion picture theaters, in violation of

sections 1 and 2 of the Sherman act, in the following manner:

Mr. Dobey: If that is stricken out, I think that would leave "in the following manner" in the original paragraph; and we ask leave to amend at this point. In addition to that, your Honor, I think that, on the part of the sentence that you ordered stricken out, I think that sentence reads, That for the purpose and with the effect of monopolizing the exhibition—Now, we concede exhibition is purely local, looked at separately; and the operation of motion picture theaters. Now, the operation of a motion picture theater [fol. 830] includes the licensing of films in interstate commerce; and when we allege that they did this for the purpose and effect of monopolization of the operation of motion picture theaters, the whole includes the licensing of films in interstate commerce; and we have, therefore, alleged that they did this; that is, the purpose and effect of monopolizing and licensing of films in interstate commerce.

[fol. 831] The Court: The question in this case is not monopolization of the exhibition of motion pictures, but the monopolization of the right to purchase the films in interstate commerce, distribution.

Mr. Dobey: I think you are looking at it from the wrong angle, it is a buying monopoly.

The Court: That is what enables them to monopolize it.

Mr. Dobey: I do not think the word distribution is quite appropriate.

The Court: Purchase of products, purchase of films, and in order to obtain all the first class films, and prevent their competitors from obtaining those films.

Mr. Dobey: That is true.

The Court: If there is ever any violation of the Sherman Act, I don't think the exhibition of the pictures would be.

[fol. 832] Mr. Raftery: We do not think it is by itself, by any means.

Mr. Dobey: No.

Mr. Raftery: I do not think Mr. Dobey thinks it is. There are certain fundamental principles of law we are going to have to get back to. The trader has the right to select his purchaser. That is ignored. Consequently you have the right to sell or not to sell as you see fit, just as an exhibitor has a right to buy or not to buy as he sees fit. In this particular situation as I see the evidence and the

way it is building up, they started in by assuming that there is some right in the exhibitor per se, to purchase different films, that particular exhibitors want, or a particular exhibitor wants to purchase, irrespective of a competitive condition. Now this clearance question which Your Honor mentioned, and the main reason I stood up, clearance in no way restrains interstate shipment of pictures; clearance is a factor by which prints are made available for every run of pictures, and that is the consent decree, there is a special provision set in that consent decree, [fol. 833] that every exhibitor who wants to deal with the big five has the same right, and every one of the five involved in this lawsuit, therefore, has a right to come in by arbitration and get some run of picture. For instance we are discussing at Madisonville and Earlington, the fact that Madisonville takes clearance over Earlington, does not deprive the gentleman on the stand at Earlington of any pictures. On the contrary, if you sell a run of pictures at Madisonville with fourteen days' clearance over Earlington, that means that this gentlemen has a right to exhibit any picture he wants under that contract fourteen days after Madisonville. What has been the practice up there is that pictures that are shown in Madisonville, are not shown in Earlington, and pictures that are shown in Earlington, like that Paramount that they are talking about, they were shown in Earlington and never saw the light of day in Madisonville. So you have a situation with respect to commerce up there, where you have had a run at Madisonville, and it has first run, it is the larger community, and then a run in the smaller community, so you would have a shifting of pictures, which would bring [fol. 834] in the regular course of business, and that is what clearance does, it opens up commerce, it staggers commerce and goes to the making of trading in the pictures.

For instance, as the showing of pictures in this immediate territory, the largest town is Nashville, then you select the second largest community and third largest, it may be it will be Knoxville, or Chattanooga, or they might play all three good towns on the same day, and you then go down the line, until you reach the smallest hamlet in the neighborhood. But the Government makes no effort to discriminate between them. Mr. Simons stands up and says we are restraining commerce, that is these pictures being thus exhibited ahead of Madisonville, that

stopped the showing in Madisonville. Now that is local practice, as I said in my opening statement, an exhibition is purely a local proposition.

The Court: I am going to agree with you on that.

Mr. Raferty: But Your Honor, where we are discussing this clearance, may be restrain-g, we contend that clearance is such interval of time that elapses between one run and another.

[fol. 835] The Court: So far as the evidence at this point in the suit is concerned, it shows that in all instances where the question has been brought up, where one town had clearance over the other, and where the first entered or other towns that ordinarily take clearance over the first town.

Mr. Raferty: That is Earlington is a smaller town.

The Court: Yes, Columbia, or Mr. Pleasant.

Mr. Raferty: Mt. Pleasant, a town of two thousand population, forty per cent colored, and the other town about ten thousand.

The Court: That is just one instance, I would not decide the lawsuit on one instance or circumstance.

Mr. Raferty: Those are the circumstances, for instance, you have a newspaper published in Columbia.

The Court: What about the proposition there when it gets down to the same towns?

[fol. 836] Mr. Raferty: In the same way, two towns same size.

The Court: In two shows, in one show, and one gets pictures and the other can not.

Mr. Raftery: It is not a question of the other show not getting a picture: They can get pictures but may not be able to get the ones they want.

The Court: It strikes me that you could not get some of the best pictures you might as well close your doors.

Mr. Raftery: No, I know some accounts that are living and living very well.

The Court: Don't misunderstand me, I did not mean to imply that United Artists or any of the rest of them are in this class, so far in this suit.

Mr. Raferty: Your Honor I assume that you can divide [fol. 837] the audience up too much, just like you have four grocery stores one on every corner here, some one is going to fall by the wayside.

The Court: You wish to amend so as to allege that the defendant exhibitors have conspired among themselves and also operated some of their theaters at a loss for the purpose of driving their competitors out of business.

Mr. Dobey: Do you think that is necessary.

The Court: That is a question for you to make up your mind on.

Mr. Dobey: I might ask that it be considered to apply the the entire plan.

The Court: Which paragraphs are stricken out?

Mr. Mosby: Fifty to fifty-three, inclusive.

Mr. Dobey: In other words, the complaint will read as it reads now with those paragraphs stricken out, no change in the complaint is necessary, except eliminate the [fol. 838] paragraphs that have already been stricken out. The complaint may stand exactly as it is if the Court will accept our interpretation of that phrase, in the following manner, in paragraph forty-five, that it applies to the ent-re remainder of the complaint.

The Court: What do you say about it, Gentlemen?

Mr. Waller: Your Honor please, I take it that they have conspired to do these things, that they have also conspired among themselves to do it.

The Court: Yes, sir, that is what the allegation is, whether they prove it or not.

Mr. Waller: The government expressly stated they did not intend to charge it.

The Court: Well it would depend upon the construction of paragraph forty-five.

Mr. Frolich: May I say this, that Mr. Dobey's request can not consistently be applied to the language of the complaint, his statement, in the following manner, may only apply to [fol. 839] paragraphs forty-six, forty-seven, forty-eight and forty-nine. When you get down to Paragraph fifty-four Your Honor, it follows the stricken paragraphs, and says by reason of the control by the defendant exhibitors of the most desirable motion pictures, etc. The defendant exhibitors have been able; it alleges here another conspiracy, this has nothing to do with paragraph forty-five, it is an entirely separate conspiracy, he says by reason of what has been done in all these other methods, and the exhibitors have done, certain things have been done, which have resulted in a monopoly.

The Court: As I said, I think the operation of theaters, even theaters cutting prices, having bank nights, amateur nights, hot seat nights, all of that is a local proposition, local management, but when all those things taken together are sufficient to enable the exhibitors to secure from the distributors contracts giving to them preference, and eliminating of pictures for the benefit of their competitors, that is a different proposition and that it seems to me is a restraint on the purchase and shipment of films in interstate [fol. 840] commerce.

Mr. Waller: Of course it affects the shipment of films, Your Honor please, but does not make a restraint.

The Court: It restrains them from being shipped to the competitors.

Mr. Waller: Yes, to one theater instead of to another theater, which is not a restraint on interstate commerce. Mr. Dobey said it has to be a buying monopoly, and of course a buying monopoly is not a violation of either section one or section two of the act.

. . . . . .

[fol. 841] The Court: Well, I don't know. It would be practically the same theory that the Government had in the Interstate case, cited in the District Court of Northern Texas.

Mr. Waller: There are two theories of that case.

The Court: Yes, there were two theories in that case, that there was a general conspiracy. As I understand the Government doesn't claim, it is not contended that there was a general conspiracy in this case among all the distributors. In that case, there was charged a general conspiracy. There all of them imposed practically the same restrictions and the correspondence addressed to all of them, containing the same proposition. Of course, I don't know what the evidence in this case is going to show with respect to whether or not there was a general conspiracy.

Mr. Waller: That is abandoned, that is abandoned completely in this case, there is no general conspiracy in this case.

Mr. Dobey: In the interstate case, it was also held by the Supreme Court, with reference to one distributor, in certain localities, to-wit, Paramount, between that one distributor alone, and constituted a violation of the Sherman [fol. 842] act.

The Court: I am not so sure about that.

Mr. Waller: Of course, that is not what the Court held.

The Court: As I remember, the Court decided that case on the ground that it was a general conspiracy, and that was just one part of it.

Mr. Dobey: There was a general conspiracy. Yes. It was held that a conspiracy between a general exhibitor and that group of distributors, a general conspiracy existed and was a violation of the Act. As I recall reading that case, it was also held in the case that in addition to this general conspiracy, there was a separate conspiracy between the exhibitors and one distributor, to-wit, the Paramount, to restrain the distribution of that distributor's product by compelling other houses not to show that product in connection with double features, and to maintain a specific admission price. That is wholly apart from the general conspiracy in the case.

The Court: Did it hold Paramount was one of the general conspirators.

Mr. Dobey: That was a conspiracy applying to a different territory.

[fol. 843] Mr. Raftery: I would like to hand up to your Honor, the Westway case, which I have undertaken to read over night, which will shed a good deal of light on how the Interstate case was held by Justice Chestnut. It was appealed to the Circuit Court of Appeals on the opinion below and it has, also, a pretty thorough discussion of the subjects of run, and clearance, and many of those questions that are involved in this case, and I would particularly like to point out to your Honor what Judge Chestnut had to say about the Interstate case. He says: "I conclude, after a careful study of the whole opinion, that it was not the effect of the quoted provision to create new, but only to apply old, well established facts as to the anti-trust acts." As far as the Interstate case was concerned, there was no specific findings of facts. They first went up on appeal and the appellants forgot to have the lower Court make a finding of facts. So eminent Counsel were there ready to argue and were sent home by the Court. Then Judge Chestnut found a specific finding of facts.

The Court: The Court ought to know better than that.

Mr. Raftery: Government Counsel, Mr. Henderson, was it, put in this provision, it was that letter which your Honor [fol. 844] referred to and was based on the finding that

the eight distributors all agreed to insert the provision that no theater in Houston or Dallas, and a few other cities, could exhibit pictures for less than 25 cents which were shown for 40 cents down-town. In the course of the evidence it was found that the dominant exhibitor or one of the Big Five, which have been entirely exempted by the consent decree, controlled practically all second run down-town houses, and in the outlying districts they got a quarter admission. So, any exhibitor who wanted to play after the other house, had to charge a quarter if he wanted to show the pictures. Judge Chestnut, in his opinion, showed that his conscience was shocked by the situation that the man in the hovel couldn't see a good picture for a dime or fifteen cents.

The Court: I noticed that.

Mr. Raftery: That is the underlying idea. When they got up in the Supreme Court to a seven-judge bench, you have got a 4 to 3 decision; it is really a debate between Judge Roberts, who wrote the minority opinion, and Justice Stone, who wrote the majority opinion. Much of the language in Judge Roberts' opinion, where he seeks to reduce to the [fol. 845] absurd the contention of the majority of the Court, was more against the picture and the business methods of operation, than the language in the majority opinion. I remember a great deal of the debate we had before Judge Chestnut where we were trying to understand and that Judge Chestnut finally observed that Judge Roberts was trying to show the majority of the Court that, in his opinion, that was an absurd conclusion and he was trying to reduce it to an absurdity. Nevertheless Judge Chestnut took the whole case where it referred to the clearance as being illegal per se, and where one distributor made a contract with the Texas Company circuit involved, made it impossible for the plaintiff, Westway Corporation to get a picture until 14 days after the other theater, that that provision by itself was illegal per se because of the language in the Interstate case decision. That is the language that I read to your Honor. I wish your Honor to consider it.

The Court: I will be glad to have it.

Mr. Dobey: I want to point out again, that the Interstate case does involve a conspiracy between, apart from the general conspiracy, it does involve a conspiracy between exhibitors and the Paramount alone, a separate conspiracy [fol. 846] between Paramount and the exhibitors with re-

spect to certain localities. As to that locality there was no conspiracy whatsoever between the other distributors and the exhibitors, but in that locality it was simply a conspiracy between Paramount and the exhibitors, and the Court held that that conspiracy between those exhibitors and that one distributor was a separate violation of the Sherman Act.

Mr. Waller: Before your Honor looks at that, may I give you my version of what Mr. Dobey has referred to. That is, that was not a conspiracy between the exhibitors and a distributor, but the Court took one of those contracts and said "I have gone into the contract to see if the contract, standing alone, contains an auxiliary agreement which is an unreasonable restraint of trade." Of course, the question of whether a contract is in restraint of trade is an old common law proposition. We have the ten year provision not to compete. That is taken as to whether it is reasonable or unreasonable, and we have the copyright privilege which is a privilege by reason of the copyright for a certain period, and there is a provision in the licensing agreement as to what shall or shall not be done by the licensee and as to what the licensor shall do. If the copyright goes be-
[fol. 847] yond the necessities of protecting the owner of the copyright, then the Court can say it is in restraint of trade. The question is whether it is reasonable or not. You take each individual contract brought out in this case, and we have a separate lawsuit in each one as to whether that particular provision in the particular contract goes beyond the necessities of trade and is reasonable or unreasonable. It is not a question of conspiracy at all.

Mr. Dobey: Do you have the Supreme Court case there, Your Honor?

The Court: Yes sir. There is one paragraph right at the end that I had in mind. The Court said: "We think the conclusion is unavoidable that a conspiracy existed, and each contract between the Interstate and the distributors by which those products were affected by the Sherman Act." Well, that means each contract when taken all together. As a part of the general conspiracy, as I interpret it. Point out to me where you say it holds that the Paramount by itself was guilty of conspiracy.

Mr. Wright: The discussion at page 219, where the separate restraint in the Rio Grande Valley is first discussed,
[fol. 848] you will find at page 219 in the second paragraph

at the beginning of the first full paragraph on the page reads as follows: "None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated (one of the defendant exhibitors) should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose restrictions in certain other Texas and New Mexico towns." Those cities were entirely unrelated to Houston and San Antonio. First runs that involved the conspiracy with the other distributors, and the action of the trial court, is discussed on page 220 in the second paragraph of that page, where they say, after stating that the trial court enjoined the conspiracy with respect to runs of the chain, or Interstate for making license agreements and enforcing them. They said: "These included both the contracts of the Interstate with the distributors and the contracts between the Consolidated and Paramount, whereby the latter agreed to impose restrictions upon subsequent run theater in Texas and New Mexico served by it." That was the restriction [fol. 849] imposed by Paramount alone in the Rio Grande Valley.

The Court: Didn't that hold that was a part of the general conspiracy?

Mr. Wright: Not at all, there was no such holding in the case, because none of the other distributors had given any basis for such a holding.

The Court: In general, at one time, all of those things were agreed upon.

Mr. Wright: Not in the Rio Grande Valley. Each of the other defendant distributors in this case declined to impose restrictions, they refused to impose them, they didn't impose them. There was, of course, one possible basis for holding that there was any conspiracy between the distributors——

The Court: I understand Paramount imposed them in the Rio Grande Valley.

Mr. Wright: Yes, they were the only one.

The Court: No, it says in certain other Texas and New Mexico cities.

Mr. Wright: That refers to the Rio Grande Valley towns that are referred to there on page 219. That language is also used "in certain other Texas and New Mexico cities", and in that case "Texas and New Mexico cities" were other [fol. 850] than those involved in the general conspiracy.

The Court: I don't understand the case to hold that Paramount imposed restrictions in the Rio Grande Valley.

Mr. Wright: Yes, they were the only distributor which did. The others all declined to impose them there. The only place where there was a concern of action between the other distributors and Paramount was in the large cities of Houston, San Antonio and Dallas. But that was the territory with respect to which the general conspiracy was made. Now, with respect to these other towns in Texas and New Mexico, it was the Paramount alone who yielded to the demand; all the other distributors refused. There was, of course, no possible basis for any charge of conspiracy in granting the demand, for nobody granted it at all but Paramount.

[fol. 851] The Court: I don't get that impression of the facts from reading the bill, I mean that case. What I got was this, that they all agreed to certain restrictions in some of the larger cities in the circuit but that none of them agreed to the restrictions that Consolidated asked for the Rio Grande valley but that Paramount did agree to impose restrictions in certain other Texas and New Mexico cities which were not part of the Rio Grande valley. Now, that is the way I got it.

Mr. Wright: Whether they call it the Rio Grande valley or not, the towns in which Paramount agreed to impose restrictions were towns in which every one of the other distributors had refused to impose restrictions or with respect to those towns.

The Court: I don't understand they refused to do it. The- just didn't do it.

Mr. Wright: There was certainly nothing in the case upon which any finding could be based. There was no attempt to make a finding that the distributors, Paramount and the other distributors had conspired or agreed among themselves to impose restrictions in those other towns in [fol. 852] Texas and New Mexico, and the injunction ran, of course, as to those only against the distributor Paramount and the exhibitor Consolidated, which were the only parties that had been involved in the restrictions that were held to be illegal. Also, the court held them illegal and enjoined their renewal and the language of the court in affirming not only the injunction arising out of the general conspiracy but enjoining each contract plainly referred to the contracts that had been made between Paramount, Loews,

and Consolidated. There is no question from an examination of the whole record but what those contracts were enjoined along with the others.

The Court: All of them were enjoined. There is no question about that.

Mr. Wright: And the entire injunction was considered and expressly affirmed by the Supreme Court.

The Court: From a reading of the case once I got the impression it was enjoined as part of a general conspiracy.

Mr. Wright: I think if your Honor will read it——

[fol. 853] Mr. Raftery: I think, in fairness to us, Mr. Wright is confusing the issue of conspiracy and the overt acts that were committed under the conspiracy. The conspiracy in the other state case originally with the O'Donnell letter that O'Donnell wrote to the eight exchanges the same date, about the eight named contained in it, were a series of demands. Now, let's assume that seven of the companies complied with fourteen of the demands and one company complied with fifteen. * * * Now, they all came out with the same statement about these overt acts that they allege were committed, and one was that Consolidated, an affiliate of Paramount—and by the way the Paramount distributor they referred to has repudiated and Paramount went the whole hog and gave them everything but it was all out of one general conspiracy.

The Court: That is the expression I got from reading the case. I don't mean to say you can't have a conspiracy between exhibitors and one distributor but all I mean to say was that I didn't understand this case to hold that particular point.

Mr. Dobey: May it please, your Honor, apparently they [fol. 854] deny there can be a conspiracy to restrain or a conspiracy to monopolize the product of just one distributor and I think that is obviously unsound. The statute says, "To restrain trade or commerce." Now, the Paramount product moves in interstate commerce; The statute says to monopolize any part of trade or commerce. Paramount's produce is part of trade or commerce. Therefore, the only question involved—therefore, it seems to me to follow logically and irrevocably that there may be restraint of trade or monopolization of the product of just one distributor and the question in each case will be whether there was a reasonable restraint or reasonable monopoly.

The Court: All right. Mr. Waller do you or Mr. Armistead have anything you wish to say on this question?

Mr. Waller: No sir, I think I have stated our position.

The Court: I will pass on this in the morning.

Mr. Frolich: Your Honor please, I haven't read the case in weeks but my impression is there was a separate conspiracy between Paramount and the other group. I think that would answer it.

[fol. 855] Mr. Dobey: Whether it is a conspiracy or contract in restraint of trade, whether they call it a contract or conspiracy, doesn't make a great deal of difference, so far as I can see.

Mr. Waller: In response to that may I say this is a conspiracy case. The Government is undertaking to bring into this case, without any pleading ten or fifteen or twenty contracts, unrelated contracts, and ask your Honor as to each of those ten or twenty contracts to pass upon whether that particular contract is a contract in restraint of trade, and that depends on the reasonableness of the provision in each particular contract. There are no pleadings on that. This is a conspiracy case and not a question of ten or fifteen or twenty contracts which the Government says are in restraint of trade. Now, if your Honor should hold that those twenty contracts were in restraint of trade what would your Honor do about it? If Columbia or United Artists or Universal were parties you might enjoin them, but as to Loews, RKO and Paramount, your Honor can't enjoin them. They are neither one before the Court.

The Court: That is what the evidence shows so far.

[fol. 856] Mr. Dobey: Is that in respect to "in the following manner"?

The Court: Yes.

Mr. Dobey: The complaint as it is, is all right. It is just a question they are arguing as a matter of construction. I like the construction and think it is all right. I think the complaint is all right.

The Court: Then, I take it, you don't wish to amend?

Mr. Dobey: I think the construction is all right.

Mr. Mosby: With reference to that question, may it please your Honor, in response to one of the interrogatories propounded by, I think it was the Big Five, the question was asked, referring to Paragraph 45: "In what manner was this combination affected?" And their reply is as follows: "The manner in which defendant exhibitors combined is as

set forth in paragraphs 46, 47, 48 and 49." Now, "the following manner" then certainly could not be extended over [fol. 857] to cover paragraph 54.

Now, furthermore, with respect to paragraph 54, in response to another interrogatory they say this:

The Court: Now, were those interrogatories made before paragraphs 50 to 53 were stricken or afterwards?

Mr. Mosby: I think they were—I think paragraphs 50 to 53 were stricken probably in February or March when you had the hearing on the motion to dismiss as to the distributor defendants now in the case, and at that time I think an extension of time was given to answer the interrogatories propounded by the various defendants. And that later on these answers were made after 50 and 53 were stricken. I think I am correct about that. I am not positive. Now, that is after 50—if I am correct about that, after 50 and 53 are out. Well, they say that the manner in which the combination was effected and the conspiracy was effected has reference to 46, 47, 48 and 49.

Now, with respect to 54 they say this: "With respect to the allegation that independent exhibitors have been induced to sell their theatres to defendant exhibitors under the threat, express or implied, that if they refuse to sell defendant exhibitor would open competing theatres in the [fol. 858] same town and prevent the independent exhibitor from procuring desirable pictures, it is not claimed that the defendant exhibitors acted pursuant to any agreement with the defendant distributors but it is claimed that the defendant exhibitors have been able to eliminate competition of independent exhibitors by reason of "—what?" "of their circuit buying power, and their control of the most desirable motion picture theatres, which control was obtained by agreements with the defendant distributors, as set forth in paragraphs 45 to 53."

Nothing said there about any local tactics.

The Court: Well, I don't think that plaintiff seriously insists that they can prove or even charge in this case that the exhibitors in this case conspired with the distributors relative to putting on bank nights, hot seat nights and amateur nights for the purpose of eliminating competition. I don't think the distributors would have been interested in that and I don't understand that that is their theory of that matter at all. Is it or not?

Mr. Mosby: Then, if your Honor please, where does the conspiracy come in with reference to——

[fol. 859] The Court: I don't know; they might. They might be insisting on it.

Mr. Wright: If your Honor please, our theory with reference to bank nights and the local competitive practices which the defendant exhibitors combine with each other to use against independent competitors, obviously the distributors had no interest as such in furthering those practices, but those were practices by which this combination of exhibitors were able to eliminate competition in other towns and thereby obtain a monopoly of film licensing power in those towns, by which they were able to coerce distributors into granting them discriminatory treatment in the other situations where they had competition, so that, in turn, they could eliminate competition in other towns. Now, it is all part of one connected process. You can't possibly separate circuit buying power that we are attempting to attack in this case from the means by which they acquired it and the way it is being maintained. Of course, the fundamental means is the control of theatres, and of course, particularly the elimination of competing theatres, so that they can get single buyer in many towns and then by linking up those [fol. 860] towns in which they have a complete monopoly in buying films with towns where there may be competitors, and in turn drive out these competitors and close those towns. Now, that is the theory on which we offer the evidence with respect to local competitive practices in the towns that they went into and in the towns where an independent sought to come in against them.

The Court: Well, I think you will agree that if they had just done that and nothing more they wouldn't have violated the Sherman Act? That is, leaving out the connections and ability to buy films?

Mr. Wright: That is true, if there was nothing more.

The Court: And the violation, according to the theory of the Government, is they are to get favorable contracts from the distributors so that the Crescent shows would get all the first class pictures and the competing shows none, is that correct?

Mr. Wright: Not merely that but that is one of the many forms of discrimination in licensing films that enables them to suppress competition. That is possibly the principal one.

[fol. 861] E. W. Dozier, Witness for the Plaintiff, Resumed:

By Mr. Simon, For the Plaintiff:

Is the witness going to be allowed to testify——

The Court: Ask him the question.

Mr. Simon:

Q. I will ask you the question, whether you had any discussion with Mr. Newman about the time that contract was negotiated, about the clearance provision which appears in it?

A. Yes, sir.

Q. Will you tell me what discussion you had with him at that time?

The Court: Who is that now?

Mr. Simon: This is Mr. Newman—N-e-w-m-a-n—a Paramount salesman, in April, 1935. This contract is dated April 3, 1935.

A. Yes, sir, we discussed the number of days, first, that I should have over Madisonville, whether it would be 7 days, 14 days or 30 days; and he said that this clearance board at this time fixed those dates, that he didn't have anything to do with them, but that they would set those [fol. 862] dates and let me know, you see.

Q. I would like for all of these letters to be separately marked with the next numbers.

The Court: Who are they addressed to?

A. The first letter, from Mr. Dozier to Charles M. Ragan, Times Square, New York City. Second letter is a copy of a letter from C. M. R. to Mr. E. W. Dozier. The next one is a letter from Mr. E. W. Dozier, signed E. W. Dozier, by M. to Mr. Newman, Indianapolis, Indiana, Attention: Mr. Ettinger.

The Court: That is all right; you need not go into such detailed description. Now, I understood you to say that Mr. Newman told him that Earlington would have clearance over Madisonville, but that the Board would fix the dates, and that he didn't have anything to do with it; is that your answer?

A. Exactly; we didn't discuss anything—This is the first contract; we were discussing about the contract I was buying. This clearance board down here was the one that fixed these days, you see.

The Court: All right, mark those exhibits. (Exhibits marked).

Mr. Simon:

[fol. 863] Q. I would like to show you Government's exhibit No. 49, and ask you if your signature appears on that letter?

A. Yes, sir.

Q. Is that a letter that you wrote to Mr. Charles M. Ragan about the date it bears?

A. Yes, sir.

Q. Had you known Mr. Ragan previous to this time?

A. Yes, sir.

Q. How did you happen to know him?

A. He was in charge of the Indianapolis exchange—exchange manager there for years.

Q. For what company?

A. Paramount.

Q. The first paragraph of this letter reads:——

Mr. Armstead: I object, your Honor, that letter is a letter from Mr. Dozier to Mr. Ragan of the Paramount Company. We are not bound by anything that may be said by Mr. Dozier, what he wrote to Paramount.

The Court: Well, I don't know that he is introducing it for that purpose, but may be generally to show what happened up there with reference to this contract.

[fol. 864] Mr. Armistead: I know, but this defendant isn't bound by any conversations Ragan had with Dozier or Dozier with Ragan, or any letter that was written about it. He can tell what the situation was up there but he can't prove it by letter.

The Court: I overrule the objection.

Mr. Armistead: May I add one other ground of my objection.

The Court: Yes, sir.

Mr. Armistead: That is, that the introduction of that would be to introduce evidence which is not sworn to.

Mr. Simon:

Q. The first paragraph of this letter, Mr. Dozier, refers to Mr. Ragan's letter of August 22, with reference to the Crescent Amusement Company. You had had previous correspondence with Mr. Ragan?

A. Yes, sir.

Q. You have copies of that previous correspondence?

A. No, I have no copy of that.

Mr. Simon: Your Honor, we have asked Paramount to [fol. 865] produce that, and we are advised by the Paramount representatives that they are unable to find this previous correspondence in their files; so I would like to ask the witness to tell us the substance of that previous correspondence.

The Court: Well, that wouldn't make it competent, just because they couldn't find it in their files; they are not entered here as defendants.

Mr. Simon: But they are co-conspirators; and we subpoenaed those letters, and they have not been able to find them.

The Court: Well, I think the letter that you have there speaks for itself, as to what they were writing about.

Mr. Simon:

Q. Well, will you tell us, then, why you wrote this letter?

A. I wrote him to ask him about their product for 1935-1936.

Q. And why did you do that?

A. Because I was uneasy; I didn't know as to the situation; I didn't know whether I would get the product or not, you see.

[fol. 866] Q. What made you uneasy?

A. Well, the Crescent was going to come in, as I understood, and I was trying to protect myself as far as that was concerned. I didn't mention that factor in the first letter.

Q. Did you receive an answer from Mr. Ragan?

A. Yes, sir, I did.

Q. Do you have that answer?

A. No, sir, I haven't got that here.

Q. I would like to show you Government Exhibit No. 50, and I will ask you if that is an answer that you received to the letter I just showed you?

A. Yes, sir; as I recall that, that is the letter I received.
Q. I would like to read Government's Exhibit No. 50.

The Court: Is that in answer to the letter you have just examined him about?

Mr. Simon: Yes, sir.

The Court: You haven't offered that in evidence yet?

Mr. Simon: No, I am going to offer both letters together. [fol. 867] Mr. Armistead: We object to it, in the first place, that letter is immaterial; and I renew my objection there about introducing letters passed between Mr. Dozier and Paramount or any other company. He could sit down there, may it please the Court—I am not saying Mr. Dozier did this, but just using this as an illustration—sit down and write Paramount a letter, and Paramount write him a letter and say Crescent Amusement Company ought to have its throat cut. Now, I certainly ought to have an opportunity to be there to see on what they base that, to cross-examine, to find out something about it. They have introduced a letter here from a man who has not testified in this case and I don't know whether he will or not; and I certainly have a right to cross-examine him.

The Court: As I understand, that is a letter that was written by the witness?

Mr. Simon: Yes, sir.

The Court: Now, you are seeking now to introduce a letter [fol. 868] to the witness in answer to the first letter?

Mr. Simon: Yes, sir, I am; this is a letter written by an agent of one of the co-conspirators, Charles M. Ragan, whom I think at that time was Assistant National Sales Manager of Paramount.

Mr. Waller: If your Honor please, we don't object to the fact that the witness got the letters; we only object to the letters being introduced for the purpose of showing the truth of what they contain. Here is a man writing a letter to Mr. Dozier and makes certain statements of fact. We would like to cross-examine that man as to where he got that information.

The Court: Are you going to have that witness here?

Mr. Simon: I think we are going to have Mr. Ragan here. Here is J. B. Howard and son, another one, on behalf of Paramount, and we shall probably have him here. And here is a Mr. M. Ettinger.

The Court: Of course, when you put in evidence a letter from an official of Paramount addressed to this witness [fol. 869] making statements of fact, that in effect admits the witness to testify as to those facts without the privilege of cross-examination.

Mr. Dobey: May it please the Court, isn't that the same as an admission of the immediate co-conspirator, or a declaration? This comes in subject to making out a prima facie case of conspiracy between the exhibitors and distributors.

[fol. 870] Mr. Raftery: All we are asking is that they leave Paramount out of this case, and they are burdened to bring them back here on something that is competent on his examination.

Mr. Frolich: Your Honor let all this go in the record on the ground of proving a conspiracy; there is no conspiracy so that they can show that anything that a co-conspirator, like Paramount, says is admissible, because there is nothing here to prove that Paramount is a co-conspirator, they are just talking about it.

The Court: Well I have stretched the rules of evidence pretty far in this case, I guess, I assume the letters would be as competent as statements made by officials and salesmen of Paramount. I will overrule the objection and permit the introduction of the evidence, upon the theory that a statement of a co-conspirator will be competent, and upon the contingency of the plaintiff proving a conspiracy to exist.

Mr. Simon: I should like to introduce government's ex-[fol. 871] hibit forty-nine, and put it into the record, read it into the record. Letter dated September 14, 1935.

Mr. Raferty: Your Honor I would like to join in Mr. Armistead's objection, because I think it is taking away from these defendants on this side of the table a very substantial right, if they ever did come to the position of a conspiracy in this case, which we doubt, but for the burden, shift the burden of calling these witnesses to the defendants, now the plaintiff is responsible for these defendants not being in this case, and that was why I made the objection in the morning against the assumption of that motion, that would cast the burden of proving there were some officials or salesmen of this big five, making statements or writing letters, it just makes, it just makes hearsay competent, and they say they are non-parties, but

they stress the fact that they are co-conspirators by calling them co-conspirators, and they let them out of the lawsuit, and I say to Your Honor that it is a great injustive to our clients, the fact of their having to go through this lawsuit, wiether it is on statements or letters.

[fol. 872] Mr. Frolich: I join in that objection.

Mr. Armistead: May it please the Court, may I make a general objection as to all evidence, to all future correspondence.

The Court: Yes, sir. Proceed.

Mr. Simon: Government's exhibit number forty-nine is a letter dated September 14, 1935, from E. W. Dozier to Mr. Charles E. Reagan, care Paramount Pictures Distributing Corporation, Times Square, New York City, N. Y.

"Dear Charlie: Glad to receive your letter of August 26 in reference to pending deal with Crescent Amusement Company.

"I appreciate your kind consideration in this matter, would like to know just what the outcome has been.

"I had your picture Every Night at Eight set in for Sat, Sun, Mon Sept 14/15/16 and they set it in ahead of me on an overnight notice September 11:12, at a lower admission price.

"I would appreciate a word from you telling me just [fol. 873] what the set-up is, of course it disturbs me just what the set-up is, of course it disturbs me quite a bit, as I had already had these pictures bought and a good number of them set in and you know my situation here,

Kindest regards."

Now I should like to offer Goverment's exhibit number fifty, and read that into the record. This is a copy of a letter dated September 16, 1935, with the dictator's initials CMR-F.

"Mr. E. W. Dozier, Roxy Theater, Earlington, Kentucky. Dear E. W.: I am referring your letter of September 14th to Mr. Howard our Indianapolis branch manager, for his attention.

"I am sure you will find he will give your problems the usual fair consideration to which they are entitled.

"Kindest regards."

I would like now to show you Government's exhibit number fifty-one and ask you if that document bears your signature?

A. That is not my signature, that is my name signed there by Mr. Murphy, my manager, I dictated that letter.

Q. That letter was written under your instructions?

A. Yes, sir.

Mr. Simon: I should like to offer Government's exhibit number fifty-one and read it into the record. This letter is dated September 15, 1935, addressed to Mr. Duff New-
[fol. 874] man, Care Paramount Pictures Distributing Corporation, 116 West Michigan Street, Indianapolis, Ind.

"Dear Duff: I just came back from Indianapolis last night and failed to get to see Mr. Howard.

"I talked with Ettinger, but he knew nothing of the Sudekum deal at all, so I wish you would talk with Mr. Howard and let me know the exact line up.

"I feel that this picture was set in before any deal was made, by the New York office, because you saw the letter from Charlie to me, saying that he would take care of this situation.

"The Capitol ran Every Night at Eight Wednesday and Thursday and advertised big in the newspaper to be shown at regular prices, 10-16-26¢, which has been my regular prices for several months.

"If you and Ettinger could figure out to set in for me, Two for Tonight for September 21/22/23 and The Big Broadcast the next Sat, Sn Sun and Mon, I would consider it a personal favor. You boys figure out just what you can do and write me Sat or Monday. Kindest regards."

Q. Can you tell us who the Mr. Howard you referred to in this letter is?

A. Paramount's exchange manager.

[fol. 875] Q. Who is Mr. Ettinger?

A. He is the booker.

Q. In what city?

A. Indianapolis.

Q. Can you tell me the conversation with Mr. Ettinger you refer to in that letter?

A. I said I didn't have any information at all at the office about any of that. Didn't know anything about it and would not know until Mr. Howard came back.

Q. Now I would like to show you government's exhibit number 52 and ask you if that bears your signature?

A. Yes, sir.

Q. I would like to read Government's exhibit number 52 into the record. This is a letter dated September 19, 1935, from Mr. E. W. Dozier to the Paramount Pictures Distributing Corporation, 116 West Michigan Street, Indianapolis, Indiana, Attention Mr. Ettinger.

"For your information the shorts you confirmed to me this morning, the first two Judge for a Day and Symphony in Black played Madisonville last week with Every Night at Eight.

"Referring to last paragraph of your letter in which you state Mr. Howard was writing Atlanta for information from them.

"I have a letter from Mr. Reagan dated Sept. 16 [fol. 876] replying to my letter of Sept. 14 to him, in which he states that he is turning it over to Mr. Howard, and that he would gibe me fair consideration in this matter, so please tell Mr. Howard to write me the facts just as they are, and what I can depend on as I am sure he will already have the information by the time he receives this letter.

"What I want to know if they sold protection over this town, and if so, for what lenth of time. Kindest regards."

Q. Now, Mr. Dozier, do you remember if you received a reply to that letter?

A. Yes, I received a reply from Mr. Howard a few days after that, I don't remember.

Q. You have a letter Mr. Howard wrote you in reply to that letter?

A. No.

Q. I show you Government's exhibit number 53 and ask you if that is a copy of the reply you received from Mr. Howard?

A. Yes, sir, that is the reply.

Q. I s-ould like to offer Government's exhibit number 53 in evidence and read this, it is a copy of the letter dated

September 23, 1935, addressed to Me—E. W. Dozier, Roxy Theater, Earlington, Kentucky.

"Your letter of the 19th addressed to Milt Ettinger, [fol. 877] our booking manager, has been turned over to me by him.

"Our Atlanta office has sold Madisonville, Kentucky. The first information I had of it was when I received word from our Home office as to the details. I have acquainted Duff Newman with every bit of information I have relative to the Madisonville deal and your setup. Duff tells me he plans on calling on you some time this week, and at that time will give you all the dope which I have on this matter. Our purpose is not to with-hold anything from you relative to your new setup and I think that you will find that Duff will give your problems every bit of consideration possible.

"Kindest regards."

Q. I would like to ask you, Mr. Dozier, whether in your dealings with Paramount for the Roxy theater at Earlington, you had been doing your business with the Indianapolis office, or with any other office of Paramount?

A. The Indianapolis office.

Q. Had you ever had any dealings with the Atlanta office?

A. Not with Paramount.

[fol. 878] Q. You recall booking in for your theater pictures "Annapolis Farewell," "Two for Tonight," and "Big Broadcast of 1936," and "Virginia Judge"?

A. Yes sir.

Q. Did you receive any communication from Paramount with respect to those pictures?

A. Yes sir, after, the way I remember it, after they set those in, they came along and asked me to pull them out, to take those pictures out.

Q. Do you have a copy of the letter you received from Paramount?

A. No sir I haven't a copy of that letter.

Q. I would like to show you Government's Exhibit No. 54, and ask you if that is a copy of the letter you are referring to?

A. Yes sir.

Q. I would like to offer Government's Exhibit No. 54 in evidence, and read that letter, which is dated September 28, 1935 from M. Ettinger (Reading):

"Dear Mr. Dozier: Due to selling the Capitol Theatre at Madisonville, Kentucky we have been forced to cancel the features Annapolis Farewell, Two for Tonight, Big Broadcast of 1936 and The Virginia Judge, which we had booked for your use.

We are also enclosing herewith, a new notice of [fol. 879] availability covering these productions together with other features which we have available for you. We would appreciate your favoring us with new play dates accordingly. Very truly yours"—

(Recess.)

Mr. Simon: Your Honor, I would like to call your attention to a letter, which we are offering as Government's Exhibit No. 55, from M. Brockett to Mr. Dave Prince, Paramount Pictures Distributing Corporation, Atlanta, Georgia, dated September 30, 1935.

The Court: My ruling didn't go so far as to hold letters were competent from one member of the Paramount organization to another.

Mr. Simon: Oh no, Mr. Brockett is an employee of the Crescent Amusement Company.

The Court: That is all right.

Mr. Simon: This letter says (Reading):

"Dear Mr. Prince: Please note the attached letter from our manager, Mr. Smith, at Madisonville, returning it for our files.

Please take this matter up with the Indianapolis in order that we may be assured of protection over Earlington at that point. Your attention will be appreciated. Yours very truly,"

This letter that was attached is a letter dated September [fol. 880] 28, 1935, from F. F. Smith, to Miss Mary Brockett, Crescent Amusement Company, Nashville, Tennessee, and is as follows (Reading):

"Dear Miss Mary: For your information Earlington played HERE COMES COOKIE, a Paramount New Season picture on Thursday Sept. 26th, and is also playing WITHOUT REGRET today, Sunday and Monday, Sept.

28-28-20. We have this latter picture in on Oct. 25. Kind personal regards. Cordially yours"——

I would like to offer Government's Exhibit No. 55 and Government's Exhibit No. 56 in evidence.

(Letters, respectively, marked Exhibits Nos. 55 and 56.)

Mr. Simon:

Q. You have a copy of that contract, Mr. Dozier?

The Court: It may be necessary for you to bring in some of the officials of the Paramount to prove some of these letters, if you don't have any additional proof of conspiracy, under the ruling I have made.

Mr. Simon: Has Government's Exhibit No. P-16 been offered in evidence? If it has not, I will offer it at this time.

The Court: What is the date?

Mr. Simon: That is the contract that Mr. Dozier signed on April 3, 1935, the one we have been talking about up [fol. 881] until now.

The Court: Let it be admitted. That is one of the clearance matters that would be determined by the Indianapolis Clearance Board?

Mr. Simon: That is right.

Q. Does Government Exhibit No. P-17 bear your signature, Mr. Dozier?

A. Yes sir.

Q. Is that the contract entered into by you with Paramount Pictures on or about the date it bears for their 1935-1936 product?

A. Yes sir.

Q. Does that contract cover the same seasons product as was covered by Government's Exhibit No. 16?

A. Yes sir, group S-7 in each one of them.

Q. With whom did you negotiate that contract?

A. With Mr. Newman.

The Court: What year was that, what season?

A. 1935-1936.

Mr. Simon:

Q. I note that this contract marked Government's Exhibit No. P-17 contains the words "Superseding Contract." Can you tell me what those words mean?

A. That supersedes the original contract that was written for first run, and this is a second run contract.

[fol. 882] Mr. Waller: We object to that being for second run pictures. I think the witness should explain what he means.

The Court: Does it say "Second run"?

A. No sir, it says "After Madisonville", which makes it second run by me.

Mr. Armistead: That is a conclusion of the witness.

The Court: Let him state what it says, I will construe the contract.

A. The original contract, Judge, was for four pictures at $50.00 each, and this is four pictures for $15.00.

The Court: The same pictures?

A. The same pictures, yes sir.

Mr. Simon:

Q. Do you know why Paramount allowed this reduction on the same pictures?

Mr. Rafrety: This is the sort of evidence that we think Paramount should cover.

Mr. Simon: All right, we will withdraw that question. We will offer in evidence Government's Exhibit No. P-17. I should also like to offer in evidence Government's Exhibit No. P-18, the contract between Paramount Pictures and Crescent Amusement Company, dated 8/22/35, for the Capitol Theater at Madisonville, Kentucky.

(Exhibits marked Exhibits Nos. P-17 and P-18, respectively.)

[fol. 883] Mr. Simon: I would like to call your Honor's attention to the clearance provisions of this contract, which reads—This is Exhibit P. 18. (Reading:) "Clearance: None. To play ahead of Earlington, Kentucky, provided Madisonville plays within 60 days of National Release."

Mr. Simon:

Q. Referring to the negotiations of the contract, which has the words, "Superseding Contract", marked on it, Mr. Dozier, did Mr. Newman tell you why Paramount was allowing you those reductions?

Mr. Armistead: We object.

The Court: Overrule the objection.

A. Because of the difference in the value of the pictures to my town and because they had sold the first run to Madisonville and left me second run, so, consequently they reduced the price per picture.

Mr. Armistead: I object to the witness stating that those pictures he was accepting and that are called for in this contract, in Earlington, were second run pictures. That contract speaks for itself. He says "Second for Madisonville." It applied as behind Madisonville.

The Court: Yes.

The Witness: The situation of Madison and Earlington [fol. 884] was one proposition. If you paid the price, then the first run included Madisonville and Earlintgon, if I didn't get the first run, they were second run almost the same as if they were in the same town.

The Court: I see what you had in mind.

Mr. Simon:

Q. Does Government's Exhibit P-19 bear your signature?

A. Yes, sir.

Q. Is that a contract that you entered into on or about the date it bears, for Paramount Pictures for the 1936-1937 season?

A. Yes sir.

Q. Whom did you negotiate that contract with?

A. Mr. Newman.

Q. Did you have any discussion with him with regard to the clearance clause that contract bears, at the time it was negotiated?

A. Yes sir.

Q. Will you please tell us what conversation you had about that?

Mr. Armistead: Objected to.

Mr. Simon: Now, I am trying to develop the negotiations leading up to the putting of that clearance clause into the contract.

Mr. Frolich: We will object to that.

The Court: Overruled. Go ahead and state what you were negotiating for.

[fol. 885] A. This contract here was to be a first run contract, if Madisonville didn't buy the pictures. If Madisonville should buy them, I was to supersede it, the same as I did the year before, 1935-1936.

The Court: Is that what it says?

A. If Madison buys F-8, this contract is to be superseded, as was S-7, Dawson Springs and Madison.

Mr. Simon:

Q. This is 1936-1937 product and the other was 1935-1936?

A. Yes sir.

Q. The question I meant to ask you was, whether prior to the time Mr. Newman wrote that clause into the contract, you had any discussion about that provision?

A. Yes sir.

Q. Will you tell us what the discussion was?

A. Well, the whole discussion was that I was to get pictures ahead of Madisonville, but he wouldn't sell them to me first run, so, he said, if we don't sell Madisonville, why then this will be a first run contract, if we sell Madisonville, then we are to write a superseding contract at a lower price per picture.

The Court: That is what the contract says?

A. That is right.

Mr. Simon: I would like to offer Government's Exhibit P-19 in evidence.

(Exhibit marked Government's Exhibit P-19.)

[fol. 886] Mr. Simon:

Q. Does Government Exhibit P-19 contain your signature?

A. Yes.

Q. Is that the contract you entered into with Paramount for their pictures for their 1937-1938 product?

A. It is.

Mr. Simon: I would like to call your Honor's attention to the clearance provision in this contract, which reads: "Clearance: Over Dawson Springs and Madisonville, Kentucky; 30 days over Earl Theater, Earlington."

The Court: Do you mean Paramount gave the clearance over Earl Theater in that year, which was the last year you had a contract with Paramount, and gave the witness' theatre, the theatre belonging to the witness over the Earl Theatre?

Mr. Simon: That is right. Now, there are *tow* things: first of all, they gave the witness' theatre clearance over

Madisonville, they also gave his theatre clearance over the new theatre that the Crescent was putting into Earlington.

The Court: What is the purpose of introducing that evidence?

Mr. Simon: We are introducing that to show that in 1937-38 season, when Paramount wasn't able to get together on a deal with Crescent, Paramount sold its pic- [fol. 887] tures to the witness with clearance over Crescent, and in just a moment, we are goin*t* to introduce the contract of the next season, S-10, under which contract, the clearance was taken away from the witness and on the contract, Madisonville was given, was clearance over the witness.

The Court: I don't see that helps your case a great deal. They took it away one year and gave it back the next year. How does that help the Government's theory that Mr. Sudekum was able to get it all the time in preference to the other?

Mr. Simon: He was able to get it all the time he wanted it, but in the year 1937-1938, Crescent didn't play Paramount pictures anywhere in its circuit until very — later in that season and when Paramount entered into a five-year contract with Crescent. Now, that franchise, in addition to the other Crescent towns, included Madisonville, Kentucky for the 1937-1938 season, and subsequent seasons. We are goin*t* to introduce that franchise in evidence in a day or two. But inasmuch as Paramount has already sold its pictures in Earlington to Mr. Dozier, and had a contract with Mr. Dozier, they didn't do the same thing that [fol. 888] year as they did in 1935-1936, take the contract away after they had entered into it with him, they permitted Dozier to play out the pictures on that contract, then the next year there, 1938-1939 season, he was able to,——

[fol. 889] The Court: That is a matter of argument.

Mr. Waller: We object to the statement of counsel.

The Court: He is not making a statement; he is just arguing the case.

Mr. Waller: In other words, there is a provision in this contract that has not been called to your Honor's attention that we want to call to your Honor's attention later on.

The Court: All right. I will hear you.

By Mr. Simon:

Q. Does Government's Exhibit No. 57 contain your signature?

A. Yes sir.

Q. Is that a letter that you wrote Mr. E. J. Barnard on or about the date it bears?

A. Yes sir.

Mr. Simon: I would like to read Government's Exhibit No. 57, a letter dated February 8th, 1937 to Mr. E. J. Barnard, Paramount Pictures, Inc., 116 West Michigan [fol. 890] Street, Indianapolis, Ind.

"Dear Mr. Barnard:

I have not heard from you since I talked to you in your office a few weeks ago about a three or five year franchise for Earlington, Ky.

I wrote Mr. Reagan a letter to the New York office regarding the franchise I talked to you about, but I have not heard from him yet. I did receive a letter from New York office acknowledging receipt of letter and said the letter was being forwarded to Mr. Reagan at Indianapolis, Ind. and while there he would talk to you in regard to this franchise.

So please let me know what has been done.

Yours truly, E. W. Dozier."

Q. Did you receive an answer to that letter, Mr. Dozier?

A. Yes sir.

Q. Do you recall who the answer was from?

A. Yes, it was from the branch manager, Mr. Barnard.

Q. Do you have the answer?

A. No, I haven't got a copy.

Q. I show you Government's Exhibit No. 58 and ask you if that is copy of the answer that you received from Mr. Barnard?

A. Yes sir, that is it.

Mr. Simon: This letter is addressed to Mr. Dozier and [fol. 891] it is a reply to the letter of February 8th.

(Reading:)

"Replying to your letter of February 8th, we should like to advise that the company does not look favorably upon franchises, as a matter of policy. I did

not get a chance to discuss this matter with Mr. Reagan when he was here, due to the press of other matters and the fact that he had only a very short time to spend here. However, I am communicating with the Home Office in an effort to find out whether or not they will consider changing their attitude in regard to your franchise. I do not, however, hold out any hopes along those lines. Nevertheless, I will try to give you something definite within the next two weeks. Kind regards.

Yours very truly, E. J. Barnard, Branch Manager."

Q. Now, did you receive a further letter from Mr. Barnard?

A. Yes, I received a letter sometime later on, stating the fact that the New York office——

Q. Well, just a minute. Do you have that letter?

A. No sir.

Q. I show you Government's Exhibit No. 59 and ask you if that is copy of the letter you later received from Mr. Barnard?

A. Yes sir.

Mr. Simon: This letter states:

"Dear Mr. Dozier:

[fol. 892] "As I anticipated, our Home office, as a matter of policy, does not wish to make more than a one-year deal in any situation the size of Earlington. I realize that this does not solve your problem, but unfortunately, there is nothing that can be done about it.

"Kind regards.

Yours very truly, E. J. Barnard, Branch Manager."

Mr. Simon: I would like to offer Government's Exhibits 57, 58 and 59.

(Papers so filed and marked.)

Q. Does Government's Exhibit No. P-21 have your signature on it? (Showing paper to witness.)

A. No, that is my manager there, Mr. Murphy signed it.

Q. Is that the contract that your corporation, the Roxy Theatre Company, entered into with Paramount for their pictures for the 1938-1939 season?

A. Yes sir.

Mr. Simon: I would like to call your Honor's attention to the provisions of this contract for the 1938-1939 produce. This contract says: "Available 14 days after Madison-
[fol. 893] ville."

Mr. Simon: I would like to offer Exhibits P-20 and P-21 in evidence.

The Court: Well, that is the 1938-1939 season?

Mr. Simon: That was the 1938-1939, the last one.

Mr. Raftery: There is something else on there about clearance?

Mr. Simon: Yes.

Mr. Raftery: You had better read that.

Mr. Simon: I will be glad to read that. There is also another clearance provision in here which provides—these provisions are somewhat separated. The other provision says "Sixty days over Earlington; available fourteen days after Madisonville."

Q. Does your signature appear on Government's Exhibit F-4? (Handing paper to the witness.)

A. Yes.

Q. With whom did you negotiate that contract?

[fol. 894] A. With Mr. Landis and Mr. T. O. McLeester.

Q. Is that a contract for the exhibition of Fox pictures for the 1935-1936 season?

A. Yes sir.

Q. In the Roxy Theatre?

A. Yes sir.

Q. Prior to the time you executed that contract had you had any discussion with any agent of Fox about their 1935-1936 product?

A. Yes sir.

Q. Who was that agent?

A. I don't know whether it was Mr. Coleman or McLeester. I imagine it was Mr. McLeester. It was one that he made.

Q. Where did that occur?

A. At my theatre at Earlington.

Q. Will you tell us what that conversation was?

A. Well, about the only thing they would say, they didn't know whether they were going to get together with the Crescent Amusement Company or not; if they didn't I would have a chance to get the pictures.

Q. When was your next conversation with an agent of Fox about the contract?

A. I would watch to see whether they did and they didn't play any pictures, so right after the first of the year I [fol. 895] made a trip to Indianapolis to see about the pictures and saw the branch manager, Mr. Lansden, and Mr. McLeester, the salesman was there too. I met him there.

Q. Were you able to buy Fox pictures for the 1936-1937 season ahead of Madisonville?

A. No, it was the 1935-1936 I bought ahead of Madisonville?

Q. How about the 1936-1937 season?

A. I didn't get a chance to buy them. They sold a franchise or sold them away from me.

Mr. Armistead: I haven't been objecting because I think we have a general objection in to any testimony of any of these film salesmen or representatives of any of these distributors or producers——

The Court: All right. Let the record show a general objection.

Mr. Waller: I think this objection should go a little further. They use the word "agent." Formerly they said "film salesman" and now they call the film salesmen agents, convert them into agents.

Mr. Simon: I think we can understand that wherever [fol. 896] we have been using the word "agent" we mean film salesmen.

Q. Did you have any discussion with any representative of Fox concerning their 1936-1937 product?

A. Yes sir.

Q. Who was that representative?

A. I am sure it was Mr. McLeester. I may be wrong on that. I think Mr. McLeester was working the territory at that time.

Q. How long after the signing of this contract did that conversation take place?

A. Well, it was sometime early in the spring of that year.

Q. And what was the conversation you had with him?

A. Well, we wanted to buy pictures for another year.

Q. And that was the 1936-1937 year you refer to?

A. Yes sir.

Q. And what did he tell you?

A. Well, he said that they were not selling at that time; he would be around to see me when the proper time came and try to make a deal with me.

Q. Did he come around to see you later?

A. Yes sir. He worked that territory. He went back and forth through there and he would stop sometimes when he wasn't trying to sell pictures.

Q. And he did come back later to see you?

[fol. 897] A. Yes sir.

Q. When he came back again what conversation did you have about the 1936-1937 product?

A. Well, I just remember one conversation about it. He said he would see me at the proper time and the next thing I knew after that, why, they had sold away from me. I didn't have any chance to buy after that.

Mr. Waller: That is objected to—"sold away from him".

By the Court:

Q. Well, they sold to somebody else, supposedly?

A. Yes.

Mr. Waller: At Madisonville or Earlington or where?

By the Court:

Q. Who was it?

A. Sold to Madisonville. That is who I considered my competitor.

Mr. Simon: I offer Government's Exhibit F-4 in evidence, and also offer in evidence Government's Exhibit F-5, which was a contract between Crescent Amusement Company and Fox Films Corporation, dated 10/19/34 for the Fox 1934-1935 product, at Madisonville.

(Papers so filed and marked.)

[fol. 898] Q. Going back to the relations with Paramount again for just a moment, Mr. Dozier, did you have any conversations with any Paramount representative early in the year 1938 in regard to the 1938-1939 Paramount product?

A. Yes sir, I talked with Mr. Newman.

[fol. 899] Q. Can you recall when you spoke to him about it?

A. Well, it was early in the year, when he came by the theater and stopped there, and I asked him about the 1938-1939 product, you see.

Q. Do you recall what he told you?

A. And he told me that they had sold a branch of it, sold a branch of it, you see, and I wouldn't be able to get any more except second run, you see; he wanted to sell me second run all the time.

Q. Did you have a conversation with Mr. Barnard about the 1938-1939 product?

A. Yes; I talked to him about it.

Q. Do you recall when you spoke to him?

A. Well, it was early in the Spring; I don't know just the exact time.

Q. Of what year?

A. It was in the Spring of 1938.

Q. And where did this conversation take place?

A. It happened at Indianapolis, at the office up there.

Q. Can you tell us what was said?

A. I just told him that I would like to have their product again another year, and they said they had sold the franchise and wouldn't be able to sell me anything except second run pictures.

[fol. 900] Mr. Waller: We object to the issue of second run pictures. I don't think he has discriminated in any of his answers as to second run pictures.

The Court: You mean second run to Madisonville or second run to Earl Theater in Earlington?

A. Second to Madisonville. I didn't consider the Earl. If you get the first run pictures you could run your theater; if you couldn't get the pictures you couldn't.

The Court:

Q. Did he state to whom he sold this franchise?

A. To the Crescent Amusement Company.

Q. For Madisonville or——

A. For Madisonville.

Q. When was that in 1938?

A. It was in the Spring of 1938, the way I remember it.

Q. Now, when he told you he could only sell you second run pictures, for that reason, did you understand that he meant he could only sell you second run pictures to run behind Madisonville?

A. That is right, yes, sir.

Mr. Simon:

[fol. 901] Q. In Government's Exhibit No. 60, is the signature of B. S. Murphy made under your direction?

A. I either dictated the letter or gave him the language of the letter I wanted him to write, you see. I believe I dictated that letter.

Mr. Simon: I offer in evidence Government's Exhibit No. 60, which is a letter to United Artist Corporation, 408 North Illinois Street, Indianapolis, Ind.

"Attention Mr. Rosenthal

DEAR MR. ROSENTHAL:

We understand that United Artist has been unable to get together with the Crescent Amusement Co. on your 1937-1938 product.

If this is true you have about 8 or 10 pictures that we could use if we can get these pictures right where we can make some money on them and that we be served out of the Indianapolis office, as the express and parcel post rates are too high for us to consider being served out of the Atlanta office.

Please advise us in regard to the above.

[fol. 902] Yours truly, Roxy Theater Company, Inc., B. S. Murphy, Manager."

Subsequently, did you enter into contracts with the United Artists for some 1937-1938 pictures?

A. Yes, sir.

Q. Was Exhibit No. 61 written under your directions?

A. Yes, sir.

Q. This is a letter from B. S. Murphy, Manager Roxy Theater Co., Inc., to Mr. M. Kruger, United Artist Corporation, 408 North Illinois Street, Indianapolis, Indiana.

"DEAR MR. KRUGER:

Mr. Dozier instructed me to write you relative to waiving the protection clause in the contract that was signed by him a few weeks ago.

We are waiving this clause as per your phone conversation with Mr. Dozier made with the understanding that we play these pictures on the 'nose', which

we want to do, and if your booking department will shoot them to us we can date same.

I am sure this contract will go through under the above conditions, and if you are going to have any [fol. 903] pictures available soon, send me availability list and I will submit dates.

Now, what season's product does that letter refer to, Mr. Dozier?

A. That would be the 1938-1939 product.

Q. Will you tell us about the telephone conversation with Mr. Kruger that that letter refers to?

Mr. Raftery: He is asking this witness to tell a conversation between a man named Kruger and a man named Murphy.

Mr. Simon: No, between Kruger and Dozier.

A. As to what conversation I had; Mr. Kruger called me from Indianapolis and said that it was impossible for him to write the protection clause in the contract, and since he hadn't sold the Crescent Amusement Company at that time, he was sure they wouldn't, and for me to go ahead and let them put the contract there without the protection clause, he would get it approved and get to serving some pictures right away. That is what Mr. Murphy meant there about playing on the nose; and I did consent to that, and they put the contract on through without interference; and it just so happened that it was the same as a first run contract.

[fol. 904] Mr. Simon: Due to the witness' statement, he said—it was a little inaccurate when he said Crescent didn't buy them; I believe there were some pictures bought this year, with the Crescent people ahead of the Roxy. I was already going to develop that.

A. That might be true; I can't recall exactly what did happen.

Q. Do you recall the picture "Stage Coach," Mr. Dozier?

A. Yes, sir.

Q. Do you recall having any discussion with anybody at United Artists about that picture?

A. Yes, sir, after we had bought the product——

Mr. Raftery: What year did he say this contract was?

Mr. Simon: 1938-1939 season.

A. After we permitted them to put that contract through, we played on during the year with a date, a number of pictures, and without notice in advance, we had "Stage Coach" set and advertised about Thursday I noticed the Capital began to advertise the same picture I had, about at the same price, I am sure, but it wasn't on the same day of the week we played.

[fol. 905] The Court: Before you or after you?

A. Just before, or at the same time we played; I don't recall; I believe we went on Saturday, and I think they went on Sunday, Monday and Tuesday.

Mr. Raftery: Was there such a clearance run, when your contract was produced, when the man had no clearance on the contract that he objected to?

A. I objected to it immediately and I paid for the cards I put on it.

Q. Did the same thing happen with respect to the picture "Cap and Furry?"

A. I don't recall that.

Q. What about the picture "Wuthering Heights"?

A. "Wuthering Heights," they bought four pictures ahead of me; I don't remember definitely; but they played before, ahead of me; I am positive of that.

Q. Do you have a letter to Mr. B. S. Murphy, dated June 27, 1939, from Mr. Frank of the United Artists Corporation (handed to witness)?

A. I have got a few letters here.

Q. Will you mark as Government Exhibit No. 62 a letter that Mr. Murphy received from Mr. Frank, of the United Artists Corporation?

[fol. 906] A. Yes, sir; I saw that letter.

Q. I think there are only two paragraphs of this letter that——

Mr. Raftery: Is that the same letter?

Mr. Simon: Yes.

Mr. Armistead: Read the whole letter.

Mr. Simon:

Q. The letter reads as follows: It is a letter from G. R. Frank, dated June 27, 1939, to Mr. B. S. Murphy, of the Roxey Theater: (Reading:)

"Dear Mr. Murphy:

Mr. Kruger is enroute to your situation in order to clear up your playdate situation once and for all.

However, we want to specially call to your attention that our approval definitely did not specify clearance over Madisonville, and your letter of September 8th acknowledged the fact that the Earlington contracts did not stipulate clearance over Madisonville.

[fol. 907] Certainly United Artists has given you every possible break, as for our company to deliver pictures to you against a big circuit on an equal basis, is showing you our willingness to appreciate your problem and give you complete cooperation. We therefore want you to sit down with Mr. Kreuger and work out the playdates on those pictures that are in question, without fail.

Sincerely yours, United Artists Corporation."

[fol. 908] Mr. Simon: I offer this in evidence as Government's exhibit number 62.

The Court: Any more evidence along this line for United Artists.

Mr. Simon: That finishes that.

Mr. Dozier, the witness: Judge, I would like to say something, I don't know whether he wants it or not, in regard to that situation there.

The Court: You want to examine him about that?

Mr. Simon: No, not now.

The Court: What is the use of cluttering up the record with a lot of immaterial matters here, so far as this United Artists incident is concerned, I do not see any significance in it one way or the other. He asked for protection and they declined to give it to him when he signed the contract.

Mr. Simon: We think the paragraphs of the letter show [fol. 909] in substance some facts we are going to show.

The Court: That is all to the benefit of the United Artists. If I had been them I would have put them on as testimony for the defendant.

Mr. Simon: We think that paragraph is not.

Mr. Raftery: Oh.

The Court: All right.

The Witness: Judge, may I say one word?

The Court: Your counsel have asked you the question.

Mr. Simon: I would like to know if there is any more cor-

respondence that you have had with Warner Brothers with respect to the 1936-37 product?

A. I have one letter, two probably.

Mr. Simon: Will you mark these with the next government's exhibits please? (Marked by the clerk.)

Q. While he is marking those, Mr. Dozier, will you *you* [fol. 910] permit me to ask you about something else, at the time the Earle theater in Earlington was opened, were you operating a bank night at your theater?

A. Yes, sir.

Q. And what was the initial pot on bank night you were operating?

A. We started out with twenty-five dollars.

Q. How many days a week were you running bank night?

A. Tuesday night.

Q. And when the Earle theater opened, how many nights a week did they have for their bank night?

A. For a short time they operated one on Tuesday night.

Q. Just what did they do then?

A. They advanced up to two nights a week.

Q. What was the initial pot they offered?

A. A hundred dollars, put it on the same night that I had mine.

Q. They put theirs?

A. Yes, sir.

Q. Did that affect your business?

A. Yes, sir, quite materially.

Q. I show you government's exhibit number 63 and ask you if this is a copy of a letter you wrote to Warner Brothers Pictures on or about the date it bears?

A. Yes, sir.

[fol. 911] Q. This letter reads.

(Reads letter.)

Q. I offer that in evidence. Did you receive a reply to that letter?

A. Yes, sir.

Q. Is that the reply you received, Government's exhibit number 64?

A. Yes, sir, that is right.

Q. Did you also receive this further answer from Warner Brothers in reply to your letter, which is Government's exhibit number 65?

A. Yes, sir.

Q. Government's exhibit number 65 is a letter from G. C. —— branch manager, to Mr. E. W. Dozier, dated January 18, 1937. (Reads.)

Q. Had you ever played Warner Brother's pictures in your theater before?

A. I do not recall playing but just one.

Q. On what occasion was that?

A. It was an occasion we had that flood up there and all the films were stranded in the territory and I played one picture, Three Men On A Horse.

Q. I would like to offer in evidence Government's exhibits 64 and 65, and also like to offer in evidence Government's exhibit Number W.2, which is a contract between [fol. 912] Rockwoor Amusement Company and Crescent Amusement Company for the theater at Earlington Kentucky.

The Court: For what?

Mr. Simon: Between Rockwood and Warner Brothers for the new theater at Warlington, Kentucky.

The Court: What do you want to put Warner Bros. correspondence in, what is the purpose of that? I do not see any significance to that, why fill up this record with a lot of things that do not mean anything one way or the other, immaterial matter, lets get down to the real issues in this lawsuit.

Mr. Simon: I think that Warner Brothers correspondence is significant.

The Court: It looks like and sounds like sales talk to me.

Mr. Simon: In the second place they had a contract with the new theater in Earlington, Kentucky, at least an application dated January 15, 1937.

[fol. 913] Mr. Armistead: Was it accepted, it wasn't accepted, was it?

The Court: That is all? Do you offer that in evidence?

Mr. Simon: I should offer this in evidence, exhibit W.2. This is the contract for Warners.

The Court: Do you make that an offer?

Mr. Simon: I withdraw this exhibit and also those two letters.

Mr. Armistead: If he is withdrawing them, I am going to put them back in.

Court thereupon adjourned.

[fol. 914] Volume Six

Tuesday, July 15, 1941

The Court: I would like to know, if you gentlemen can enlighten me, with regard to the findings in other District Courts on the question we had up yesterday afternoon.

Mr. Raftery: The question was up in 113 Federal Circuit. And also was followed by Judge Kellogg, the other case in Chicago, who made practically the same identical findings of fact and conclusions of law that were made in that case; that is, the same reasoning; went up on appeal and was just recently affirmed on appeal in that circuit; that is, within the past six months.

The Court: I was interested to know the findings in that case.

Mr. Raftery: That is right, that is the reason I mentioned it to your Honor yesterday, on account of the extraordinary view the Government was taking in the Interstate case.

Mr. Wright: If the Court please, we didn't quite hear the [fol. 915] citation he was referring to; was that the Westway case in Baltimore, the one your Honor mentioned?

The Court: Yes.

Mr. Wright: In that case, I think your Honor will recall that Judge Chester devoted a great deal of space in his opinion to the particular clearance that was shown in that case. Of course, there wasn't any necessity for him to go into the reasonableness of the clearance, for he took the view as a matter of law that there couldn't be any violation by the one distributor imposing any reasonable clearance with respect to a certain situation, because he said then there was nothing to indicate any conspiracy between and of the distributors. Then he reviewed the facts very carefully and reached the conclusion as to each particular clearance which each distributor had given.

The Court: Well, he did differentiate the question in the Westway case from the question in the Interstate case, on [fol. 916] the ground that there was concerted action in the Interstate case between the distributors and exhibitors, and nonconcert of action in the Westway case.

Mr. Wright: That is my point; he didn't stop there but went on and found it necessary to differentiate between particular instances, and the theory on which he did that

was the violation would have occurred if a single distributor had caused a violation of——

The Court: I think the particular facts in each case are necessary to determine the question.

Mr. Wright: There is no question about that. It is certainly true that each clearance case depends upon the facts in which the clearance was made. I don't think there is any question under the Interstate case or under the other case; both Judge Harlan's opinion in Chicago and Judge Chester, considered the question of the distributor, whether the distributor caused unreasonable clearance. That is, of course, the theory on which unreasonable clearance is arbi- [fol. 917] trated in the consent decree; there is not any necessity for any injunction against a conspiracy there whatsoever between distributors; but the distributor has the right to come in and, with respect to any single distributor, arbitrate the question whether or not that distributor has or has not imposed unreasonable clearance with respect to his pictures. I think certainly that has been understood to be the law by all parties to that situation. I do not think any of these cases that were decided indicate any view of the law with respect to when an unreasonable clearance has been taken by any District Judge.

The Court: It comes back to the facts.

Mr. Raftery: In the majority opinion in the Interstate case the Court in effect said a distributor could independently and separately sell an exclusive run in any given situation. That would mean that a second run with agreement not to be exhibited again anywhere in the State of Tennessee; that is what exclusive run means. So I can't follow. If you have a right to sell exclusively under the [fol. 918] law, you certainly would have the right to sell any clearance you want to sell. There is no evidence of any offer as yet as to any unreasonable clearance there, as to duration and when. The nearest approach to a long clearance came out yesterday, when this gentleman took 60 days clearance for his theater in Earlington over his competitor, the Earl, the Sudekum house; that is the longest clearance that I have heard so far in this case.

The Court: All right, Mr. Waller.

Mr. Waller: I want to say this, your Honor, that assuming Mr. Wright is correct in his theory, that we can take each of these contracts that may be brought into this case and go into each one of these contracts and find out whether

those clearances are reasonable or unreasonable. Suppose your Honor finds some contracts are unreasonable, what can your Honor do about it? These contracts have expired; these parties to the contracts are not before the Court, and there is nothing that your Honor can do about those contracts in this case. And this case isn't a conspir-
[fol. 919] acy case as far as the distributors are concerned; that is out of the case.

The Court: You mean so far as the distributors as a group are concerned?

Mr. Waller: Yes, sir, so far as the distributors as a group are concerned.

The Court: Now, as I understand, it is the defendants' theory in this case that the restrictions imposed are not unreasonable, because of the fact they were imposed on the defendants.

Mr. Waller: Even if they were, that is not a conspiracy; a contract between an exhibitor and a distributor as to clearance is not unreasonable. Unless they can be tied up with a conspiracy among the distributors they don't belong in this case.

The Court: It could be brought in under section 2 of the act, could it not?

[fol. 920] Mr. Waller: No, of course not; section 2 of the act prohibits the monopolization of interstate commerce. Now, a bunch of distributors who had control of a large percentage of the distribution of films, could get together and monopolize the supply of films; but one of those distributors couldn't possibly monopolize the supply of films. Now, the only people that could monopolize the supply of films would be the distributors and the only way they could do that by monopolization would be to buy them.

[fol. 921] The Court: They follow the words of the statute, in commerce, means any particular item of commerce.

Mr. Waller: Yes, in other words, monopolizing has the same meaning.

The Court: Does not mean any small part, any particular item.

Mr. Rafferty: Judge Stone in the — case I think pretty well disposed of that.

The Court: All right, proceed with the witness.

Cross-examination.

By Mr. Armistead:

Q. Mr. Dozier, I believe you stated on yesterday that the population of Earlington was about three thousand?

A. About thirty-two hundred, that is what their signs say, I don't know the population.

Q. And the population of Madisonville was about ten thousand?

A. Yes, sir.

Q. Those two towns are just three miles apart?

[fol. 922] A. Between three and four, yes, sir.

Q. Now that theater in Madisonville, the Capitol theater, was the one in which you at one time were interested?

A. Yes, sir.

Q. I wish you would describe the size of that theater, the number of seats it had in it?

A. I think eight hundred.

Q. Did it have nice rest rooms, nice seats, good equipment in it?

A. Yes, sir, reasonable equipment and reasonable seats and rest rooms too.

Q. And nice outward appearance?

A. Yes, sir.

Q. Well managed?

A. Yes, sir.

Q. Now this theater that you constructed in Earlington had how many seats in it?

A. Between five and six hundred, I do not remember exactly.

Q. But that was not as large a theater building?

A. No, sir.

Q. As the one in Madisonville?

A. No, sir.

Q. Now you and the Crescent Amusement Company owned that Capitol theater at one time—that was a corporation, was it not?

[fol. 923] A. Yes, sir.

Q. And you sold that stock to Crescent?

A. Yes, sir.

Q. May I ask why you did that?

A. Why I sold the stock?

Q. Yes, sir, was it because of the depression through there?

A. It was because that theater was not properly financed. Mr. Sudekum said it was not necessary, that the Sumner Construction Company built the theater, from this city here, and they could carry along without properly financing, and of course then when the crash came, why we had a note in this town for about seventeen thousand dollars in one bank and this bank was taken over by another bank, and then they called on us for the money, see, and it was necessary for us to get up that money to pay that off, and Mr. Sudekum said get up your money my half and he would get up his and we would pay it off, we would pay the note off, but at that particular time it was hard to get money, and you had to put up three or four to one to get it, and so I sold my interest out at a small amount, because I would have to sacrifice too much in order to get the money, in the first place, the only reason I had taken him in and built the other theater was financing, and I needed him for nothing else than that. I thought he was the one that should have carried on the financing as we started it.

[fol. 924] Q. Now as a part of that agreement to sell to him, you obligated yourself not to compete with the Crescent company in Madisonville?

A. That is correct.

Q. Was Earlington big enough for a theater?

A. Well there had been one over there for years, operating once in a while, so Mr. Sudekum didn't, and then the theater would close up a while, so Mr. Sudekum didn't think it was big enough, I thought it was big enough for a small theater over there, to make a reasonable amount of money.

Q. Now after you started to operating that theater in Earlington, didn't you advertise your shows and pictures in Madisonville, Kentucky?

A. Yes, sir, they had the only newspaper we had in the county out there, see, probably one at Dawson Springs, but that was in the western part of the County.

Q. So you were competing with Crescent Amusement Company in Madisonville?

A. I think I had a right to advertise in the papers, put my cards in Madisonville and Earlington and Dawson Springs, they were all near Earlington, and I thought it was all right to put my cards in Madisonville.

Q. Was your Earl theater—so your Earl Theater was competing with the Capitol theater at Madisonville?

[fol. 925] A. If you call that competing.

Q. Don't you think that it took some business from it?

A. Took quite a bit, yes, sir.

Q. Coming back to these Paramount contracts; you, started you theater on May 12, 1932? I believe?

A. That is right.

Q. And started using Paramount products at that time?

A. That is right.

Q. Did you have any understanding with Paramount that if it sold its films in Madisonville, that Madisonville would have a prior run over Earlington?

A. Well the way I remember it there was nothing in the contract, the first conference was written out if Madisonville, if they should write a superseding contract,—I do not have the first two or three contracts, I do not have those first contracts, they were written.

Q. It was not in the contract, but there was a tacit understanding between you and Paramount that if Paramount films were sold to Madisonville, that it would have a right to show those films prior to Earlington?

A. No, that was not the understanding.

Q. How about this 1935-36 contract with Paramount, was that modified later on, it was, was it not?

A. Yes, sir.

Q. Why was that done?

A. Well because they sold them away from me to Madi-

[fol. 926] sonville. I needed some pictures and there wasn't anything I could do, it just—of course my contract was for a first run for the situation down there, and when they sold Madisonville, that depreciated the value of my pictures at least my part of the playing of the pictures, seventy-five per cent, and they gave me a reduction of about that amount, see?

Q. If you had a contract with Paramount that you had a right to exhibit films in Earlington prior to the exhibition of them in Madisonville, why didn't you stand up for your rights?

A. Well whenever you go to suing a picture concern, you don't get very far, so the people you do business with, I have been in business with Paramount for years, and *and* we want to do business with them, and I could get it back may be in years, but they had passed, I had to do the best

I could about getting pictures from then on every time I made any effort I couldn't afford for them to get mad about anything, I would have probably gotten less consideration than I did if I had got mad.

Q. Now Paramount never allowed a film, one year's films, to be exhibited in Earlington, Kentucky, during the entire time you were operating the theater there, until after you had exhibited the film in your theater, is that not correct?

A. Ask that question again, Mr. Armistead?

[fol. 927] Q. I say during the entire time you were operating the theater in Earlington?

A. Yes, sir.

Q. Paramount never allowed any of its films to be exhibited in that town until after you had shown the films in your theater, isn't that correct?

A. Well, there wasn't any other theater there to show films during the time the Crescent built the Earl, I had the only building there.

[fol. 928] Q. Well, my question was,——

The Court: His question included your Earl Theater.

A. No, the Earl didn't show Paramount pictures while I was there.

Mr Armistead:

Q. So, every Paramount picture exhibited in Earlington was exhibited by your theater.

A. That is right.

Q. Now, yesterday you mentioned that you had trouble getting product, you couldn't get product. When the opposition theater, the Earl Theater opened in Earlington, Kentucky, what product were you using?

A. When they opened?

Q. Yes, sir.

A. Well, I was using Paramount, Columbia, and Universal and probably some product from some of the independent concerns, I am not sure whether I was using United Artists or not, but I believe I was.

Q. Now then, during the entire time that the Earl Theater was in opposition to you, you continued to use Paramount, Columbia, and Universal, did you not?

A. I did not. I was using Paramount for the second run because that meant nothing to me, as a second run proposition.

[fol. 929] Q. What is that you were using?

A. I was using Paramount when they offered me a second run contract but I didn't consider that was anything—about 25 per cent of what they were when they were first run.

Q. So you were using Paramount, Columbia and Universal and you continued to use that product until you sold out?

A. Yes sir.

Q. Now, you were offered Warner's product, were you not?

A. Pardon me, I didn't get that?

Q. Were you offered the Warner product?

A. I was offered a second run proposition, perhaps, from them.

Mr. Armistead: I would like to have the letter from Warner to you, which was withdrawn, Mr. Simon, please sir.

Q. On January 18, 1937, Warner Brothers Pictures wrote you a letter as follows: (Reading)

"Dear Sir:

Your letter of January 16th at hand, and in reply wish to say that we have just consummated a deal with Madisonville, Ky. which is owned and operated by the Sudekum Circuit.

I understand Sudekum is opening a theatre in Earlington and is desirous of using our pictures there, however, I have left this town out of the deal inasmuch as I understand you are a Warner customer, and preferred to give you first preference on the product. [fol. 930] "I would thank you to advise me, by return mail, whether or not you will be interested in Warner product after Madisonville, Ky.

Yours very truly, —— ——."

Q. You received that letter, didn't you?

A. Yes.

Q. It says in here that you were using Warner product; is that correct?

A. That was not correct.

Q. Well, that you were a Warner, or had been a Warner customer, is that correct?

A. I never had been. I ran one,——

Q. Why didn't you accept that offer?

A. Because I knew that offer was not—They knew I wasn't interested in second run, they knew I was only interested in what they had sold to Crescent Amusement Company, all the film companies knew, all of them knew, what it took in my situation and that their second run didn't mean anything to me, except just to fill in pictures.

Mr. Armistead: Defense offers this letter in evidence as Defendants' Exhibit No. 34.

(Letter marked Defendant's Exhibit No. 34.)

Q. Mr. Dozier, I understood you to say a while ago, in your opinion, Earlington, Kentucky, was a big enough town for a theatre?

A. Well, I thought that Earlington and with the little [fol. 931] towns surrounding there in that part of the county, you see, that is the South part of the County, that was the situation there, with only one theater running in Madisonville and two others close over there, that there would be sufficient business there for in that territory, for another theatre.

Q. Well, had you ever endeavored to buy Warner's product for Earlington, Kentucky?

A. Well, Madisonville had that product bought when I went into business over there and my understanding was about it that they had a franchise that had been in operation for quite a while, so I was in Indianapolis a time or two and asked them about the product and they always told me it was sold to Madisonville but they would sell me second run, but I was not interested in second run.

Q. That would be first run in Earlington, wouldn't it?

A. That isn't the way you would figure that. It would be, in Earlington, but Earlington is only a part of the situation in that territory there. Second run, after it followed Madisonville, didn't mean anything to me in Earlington, that is, a feature picture. Other than that, it didn't make much difference because a certain amount of people in Earlington didn't go to Madisonville, and Western pictures and stuff like that, it didn't make much difference, but a feature picture, it made a good deal of difference.

Q. Did you buy Metro's product?

[fol. 932] A. Yes.

Q. What year?

A. Well, I tried to get it, I did get it the first year I was there, I started out, the first two pictures I ran were Metro. At Madisonville, Crescent Amusement Company hadn't bought them and didn't have them in Madisonville and I understood they hadn't been used for several years and of course a year or two I got them, in fact I wanted to use the product and started with them, and after I had been buying them, then Crescent bought them. My Second pictures was "Eminent", I ran it Saturday and Sunday and they bought it and put it in Madisonville Sunday and Monday.

Q. You and Crescent were competing with each other, you would like to show a picture that Crescent had, and Crescent would like to show a picture that you had?

A. It meant money for each one of us to get the picture first.

The Court: Was it your theory after you sold out your theatre in Madisonville, that had been running these pictures as first run, then went over and opened up a theatre in Earlington, which is close by, that the producers would have given you their product in preference to Madisonville?

A. There was sufficient product for both of us, he run one theatre and I run one and for the people as a whole to have a chance to see every good picture. They could run one [fol. 933] and I run one, there was sufficient for both theatres.

Q. How could you both run first run?

A. The pictures he ran in Madisonville I didn't buy for Earlington, and what I bought for Earlington, he didn't run in Madisonville and we would have good pictures for that community which was made by all the producers of the pictures. It was an ideal set-up for the territory up there. He was running one at Madisonville and I was running one at Earlington; of course, hardly ever a year that he buys all the product, so the people would get only a part of the product there.

Q. And the other part would be available for you?

A. Yes, the part they didn't want was available to me—yes, if they couldn't get together or didn't buy.

Q. Crescent Amusement Company in Madisonville didn't show the entire product of all those other five distributors,

I mean, of all six distributors, did it—Paramount, Metro, Fox, United Artists?

A. What years are you talking about?

Q. Any of those years?

A. From the beginning over there, they had certain products and I had certain products for Earlington, and of course what product they didn't buy, I did buy. The distributors, as a whole, gave them, at least the five major companies, they gave them the preference, they would give him the first chance to buy the pictures, and if they couldn't [fol. 934] agree, or they didn't trade with them or didn't sell them then I got a chance to buy.

Q. Madisonville was nearly three times as large as Earlington?

A. Yes sir, that is about right.

Q. Let me see if I understood correctly. Is it your idea that these distributors should have sold these pictures in Earlington in preference to Madisonville?

A. No, not particularly that. They tried to sell all of them to Madisonville first, except United Artists, pretty well, they tried to, but I don't believe Columbia and Universal, I think they stayed right off, I don't think they tried to sell Madisonville because they were getting as much out of Earlington as they would get out of Madisonville and Crescent didn't get those two products.

Q. Did you get any clearance at all over Madisonville from any distributor when the product had been sold to Madisonville?

A. No, not when the product had been sold to Madisonville, I didn't get any clearance.

Q. This clearance you got over Dawson City, how far is that from Earlington?

A. It is about 18 miles. They advertise out just — they do in Dawson Springs, which is about 18 miles away.

The Court: What size town is Dawson Springs?

A. It is about 2500, I believe. That would be my guess, something near that.

[fol. 935] Q. Now, Mr. Dozier, when you first, you and Mr. Stengel, were negotiating for the sale of the Roxy Theatre in Earlington, you didn't set any price, did you, at that time?

A. With Mr. Stengel?

Q. Yes.
A. Yes sir.
Q. You did set a price?
A. Yes.
Q. What was it?
A. $16,000.00.
Q. What did you finally receive?
A. $7,000.00.
Q. Well, that was how many years later?
A. Well, that was two and a half years, about that.
Q. Now, in this final sale, there wasn't any real estate involved in it at all, was there?
A. No sir, no real estate.
Q. Now, Crescent Amusement Company, during the 1936-1937 and 1937-1938 years was not using Paramount product in Madisonville, isn't that correct?
A. Well, they didn't use it when I went over there, they didn't use the product until 1935-1936. They used it that year then they used it in the year following, then I used it a year and then they bought the franchise.
[fol. 936] Q. To refresh your recollection, Mr. Dozier, wasn't it 1936-1937, and 1937-1938, that Crescent was not using Paramount products?
A. In Madisonville?
Q. In Madisonville, yes, they were using it in 1935-1936?
A. They were using it in 1935-1936.
Q. And the following year they didn't use it at all, isn't that correct,
A. No, they used it the next year, the way I remember, 1936-1937, and then had it one year, you see, and then sold the franchise to them. I am sure that is correct.
[fol. 937] Q. We'll straighten that out in a little bit. I think you are mistaken about that.
A. Well, I might be, as far as the dates are concerned.
Q. Now, didn't you tell Mr. Stengel to inform Tony Sudekum that if the Crescent opened a theatre in Earlington to compete with the Roxy that the Crescent certainly would have competition in Madisonville?
A. Well, the last talk I had with Mr. Stengel was in the Hotel Madison lobby and after I had withdrawn the proposition of leasing it to him for the reason that the financial statement of the Rockwood Amusement Company didn't warrant making a lease but I would lease it to the—if Mr. Sudekum or the Crescent Amusement Company would

sign the lease, but I preferred to sell it to him and let him name his own terms, and he said, no, they weren't interested but one way and that was to lease it. Of course, I told him I wouldn't lease it on those terms he suggested, see, and he said if I didn't lease it to him the Rockwood would not build in Earlington but the Crescent Amusement Company would buy a lot and they would build in Earlington and run me out of business over there. And I said if they do that I will build a theatre in Madisonville against them.

Q. In spite of your contract of agreement that you would not?

A. I said that to him but, of course, at that time it [fol. 938] was in the heat of argument and I didn't at that time think—of course, I had signed a ten year contract not to come back into Madisonville and I tried to live up to it.

Q. You say you tried to live up to it?

A. Yes sir.

Q. By opening the Roxy Theatre in Earlington?

A. Yes sir, I did, because I didn't tell him—you see, you wasn't Mr. Sudekum's attorney at that time; it was Mr. Stokes, but he had written in this contract to keep me out of Hopkins County and I talked to him and I said, yes, that was the agreement; I agreed to stay out of Madisonville. I said I might open up a theatre at Dawson Springs or Earlington for Dawson Springs wasn't open at that time. I have got to make a living from some source and Mr. Sudekum said to his attorney, yes sir, that is correct, just Madisonville; that was the deal, so the contract was written just to cover Madisonville.

Q. Mr. Dozier, referring to your contract, which has been made an exhibit—anyhow, it is the contract with Paramount and you dated April 3, 1935, which has been made an exhibit by the plaintiff, and in that I call your attention to the following printed matter, in the contract:

"Selection of play dates.

6th. Unless otherwise agreed upon or unless defi- [fol. 939] nitely specified or otherwise provided for in the schedule, exhibition date or dates of each of said motion pictures shall be determined as follows: (1) Subject to prior runs and/or clearance granted or hereafter granted by the distributor to other exhibitors and within reasonable time after a print or

prints of any said motion pictures are received at the exchange of the distributor out of which the exhibitor is served; and provided, the exhibitor is not in default hereunder. The distributor shall mail to the exhibitor a notice in writing of the date when each of such motion pictures will be available for exhibition by the exhibitor, which date is hereinafter referred to as the available date. Such notice shall be mailed to the exhibitor at least fifteen days before the available date therein specified."

That was in the contract, was it not?

A. Well, those contracts are such one-sided contracts. I don't think that I ever read a contract because they have only one contract for you to sign and you sign it or you don't sign it, whether it is right or whether it is wrong. They are all one-sided as far as the exhibitor is concerned.

Q. I say those words I read were in this contract?

A. I imagine they were; whatever is in there; I didn't read them.

Mr. Armistead: Counsel for plaintiff says or has agreed that those words are in the contract.

[fol. 940] Q. Now, you had Paramount put the sixty day clearance clause in your contracts at your request, did you not?

A. Well, probably so but as far as the sixty days clearance is concerned over the Earl, that didn't amount to anything in particular. I never asked for any undue clearance over Madisonville. There came up a claim ahead of Madisonville where they finally decided seven days. I didn't care whether it was seven days or seven weeks. The main thing was to play ahead of Madisonville, and the Earl Theatre there, as far as that is concerned, didn't amount to anything to me on my feature pictures. It did mean competition on serials, westerns and the smaller contracts but the feature pictures it didn't amount to anything one way or the other.

Q. Why did you request the clearance clause be inserted?

A. I couldn't tell you that; I don't remember.

Q. Did Paramount have any serial pictures?

A. No.

Q. And you don't know why you asked that the sixty day clause be inserted?

A. I suppose he just figured it was reasonable clearance. I didn't ask for any certain number of days. As far as the Earl was concerned, it didn't make any particular difference.

Q. I was trying to find my notes. I made some notations yesterday when you were testifying. As I caught it, you said that Paramount cancelled the contract about certain pictures, three or four pictures. You didn't mean [fol. 941] they cancelled and they wouldn't let you exhibit those pictures, but just changed the play dates or re-arranged the play dates, is that correct?

A. Well, I don't just recall what particular thing you are talking about but there when I had bought the 1935-1936 and then when they sold the run at Madisonville ahead of me, why, then, of course, I had those pictures already set in and they took these pictures out and then I bought a superseding contract and then they re-dated those pictures after I bought a superseding contract.

Q. In other words, you did get to exhibit the pictures?

A. Yes, second run.

Q. Now, Mr. Dozier, they were exhibited in Earlington for the first time, weren't they?

A. Mr. Armistead, the situation at Earlington is just like it is throughout the United States, on all of these independents. You only get the pictures when the chains don't need them or don't want them. There is no other way they get them today. That is not only in Earlington that way but it is the same thing throughout the United States.

Mr. Armistead: I move to strike the answer on the ground that it is not responsive.

The Court: Yes, it is a conclusion of the witness.

[fol. 942] Cross-examination.

By Mr. Frolich:

Q. Mr. Dozier, you got Columbia product in Earlington from 1933 down to 1939, didn't you?

A. Yes sir.

Q. Did Columbia make all of its pictures available to you each and every season for Earlington?

A. Yes sir.

Q. I show you these contracts, Defendant's Exhibit No. 35, and ask you to be good enough to look at the contracts

and state whether or not they are the contracts made by you with Columbia from 1934 down to 1939, a group of eighteen contracts.

A. Yes sir, they look like the contracts.

Mr. Frolich: I offer these in evidence as group exhibit No. 35 for the defendant.

(Contracts so filed and marked.)

A. In fact, Columbia was very fair with me about pictures except the fact that, of course, in all our contracts there they said in there if they sold to Madisonville, of course, I have no contract; it is out.

Q. Didn't these contracts contain a provision that you had clearance of fourteen days over Madisonville?

A. Well, I noticed one down there that it also says if they sold to Madisonville, see? If they sold to Madisonville I have the right to cancel the rest of that contract, [fol. 943] see? That was the only kick I had with Columbia, the fact that I never knew whether I had a contract or didn't have it. If Madisonville bought it I didn't have that contract and if they didn't buy it, why, I had a contract.

Q. Don't you know that Madisonville never sold Madisonville all those years?

A. Yes sir. That is the way it worked out.

Q. In 1939 when you sold out to Sudekum you had at that time in your possession the last contract of this group of contracts for fifty seven Columbia pictures?

A. That is right. The only kick I had with them was that I never knew but it worked out that I always had pictures.

Q. Did you ever give voice to the kick by any letters to Columbia?

A. I am sure I did. I kicked to the salesman every year I signed a contract. It left me in the dark as to whether I would have a product or whether I wouldn't.

Q. And actually you received your pictures each season from Columbia?

A. Yes sir.

Q. So that your fears were really groundless, weren't they?

A. Yes sir.

Q. Columbia treated you very fairly, didn't they?

A. Yes sir.

[fol. 944] Re-direct examination.

By Mr. Simon, for the Plaintiff:

Q. Mr. Dozier, when you sold the Roxy Theater in 1939, did that sale include the sale of the equipment in the theater?

A. Yes, sir.

Q. And what was, in your opinion, the value of the equipment in the theater when you sold it to Crescent?

A. Well, I had in the theater equipment between six and seven thousand dollars; and three thousand dollars, about, of that was spent in remodeling the building, and the balance of that was equipment, seats and necessary cooling system, and all the necessary equipment that goes with the theater.

Mr. Raftery: That was not in response to the question asked.

The Court: I did not have my attention on that. Read the question and answer. (Reporter reads question and answer.)

The Court: Well, he said the equipment was about six or seven thousand dollars. All right.

And further this deponent saith not.

[fol. 945] Wm. P. Miller, called as a witness in behalf of the plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, for plaintiff:

If the Court please, Mr. Miller, the next witness, is employed as manager of the theater at Rogersville by Crescent Amusement Company; We are calling him as an adverse witness under Rule 43b.

Q. State your name and address, please?

A. William Pope Miller. Rogersville, Tennessee.

Q. Will you try to keep your voice up, so that these gentlemen over here can hear you. What is your occupation?

A. I am now managing the Rogersville Theater.

Q. For whom?

A. For Rockwood Amusement Corporation.

Q. How long have you been employed as Manager of that theater?

A. It will be three years September 4.

Q. That was the date on which you sold the theater to Crescent? or sold your Palace Theater to Crescent?

A. And September 4, 1938.

Q. How long had you been in the theater business in [fol. 946] Rogersville before that?

A. I went in the theater business in 1917, about September 17.

Q. You opened the Palace Theater there in February, 1933?

A. No, I had the Palace Theater in 1917; kept the name all the way through.

Q. But you built a new theater there and named it the Palace, in February, 1933?

A. Yes, sir.

Q. That was the theater that you sold to Rockwood Amusements?

A. Yes, sir.

Q. Now, was that the only theater in town when you started it?

A. Yes, sir.

Q. How big was the town then?

A. About 1600 and something, I believe, in population.

Q. Do you know about how large it is today?

A. About 2200.

Q. Then, when was another theater opened in the town?

A. In about October, in 1936, I believe it was.

Q. Now, when did you first learn that that theafer was going to be built there?

A. During the summer of 1936.

[fol. 947] Q. How did you find out about it?

A. I found it out through the bank that had sold them a piece of property near the hotel for a theater site.

Q. Was there any sign on the site?

A. Yes, sir, there was a sign on the site later; later on they put a sign on the site.

Q. What did the sign say?

A. I don't remember what it said at the present time?

Q. Well, before the sign went up, or before you found out about the new theater, did you have any conference with anybody from the Cumberland Amusement Company about it?

A. No, sir.

Q. Or any one else?

A. No, sir.

Q. When was the first time you talked to any one from the Cumberland Amusement Company about the new theater?

A. Well, about a week or ten days before the theater opened.

Q. To whom did you talk?

A. He was foreman on construction for the Cumberland Amusement Company. I believe his name was Lawes.

The Court: You say his name was Boss?

A. Lawes.

[fol. 948] Mr. Wright: L-a-w-e-s.

Q. What was the conversation you had with him?

Mr. Waller: We object to that, if your Honor please—a conversation with a construction foreman.

The Court: Yes, sustain the objection.

A. Mr. Lawes, he——

Mr. Wright: They object, and it was sustained.

The Court: Yes.

Mr. Wright:

Q. When was the next time you saw any one connected with the Cumberland?

A. It was in 1937, I believe.

Q. And who did you see then?

A. A Mr. Potts, who was manager of the Morristown Crescent Amusement Company house.

Q. At Morristown?

A. Yes, sir.

Q. What was the conversation you had with him?

[fol. 949] Mr. Waller: If your Honor please, that is not competent; he is not shown to be an officer of the company.

Mr. Wright: He was manager of the Crescent Amusement Company and made arrangements for them to get in touch with the Cumberland.

The Court: Overruled.

Mr. Wright:

Q. What was the conversation you had with Mr. Potts?

A. Well, he said I should get together with the Cumberland Amusement Company and sell out to them, and to tell them the town, I believed, was too small for two theaters.

Q. Well, what did you say?

A. I said, I hate to sell out. I am not doing any good, but I think this town belongs to me; I went through all those years and have had it hard; but I will write you and make you a proposition to send it into the company; and he said he would send it in to Nashville, to Mr. Tony Sudekum—the proposition.

Q. Is that about all the conversation you had there?

A. That is about all.

[fol. 950] Q. Then did you write a letter making a proposition to Mr. Sudekum?

A. Yes, sir—No, I don't know whether I made it to him or Mr. Potts; he said he was acting as a representative of the company, and it would be all right, everything would be O. K. and he wanted to send it in.

Q. Have you a copy of that letter?

A. I have a copy of that letter.

Q. Have you got it with you?

A. No, sir, I didn't bring the letter because my subpoena didn't say anything about any letter on the trade proposition.

Q. Do you recall what the substance of the letter was?

The Court: How much did you offer to sell for?

A. Offered to sell for $4500.00 and a job at $250.00 a month to take over the theater; that was $250.00 and pay for employes.

Mr. Armistead: I didn't get that last.

The Court: That he was paid $250.00 a month to operate the theater and to pay the employes out of the amount.

A. And me to keep my equipment.

[fol. 951] Q. To keep it up?

A. No, to keep my equipment.

Q. And what were you selling in that equipment?

A. I was just selling the key to the town.

Q. Selling at least the good-will, is that it?

A. Yes, sir.

Mr. Wright:

Q. Then, after you wrote the letter, what happened then?

A. Well, there was some entanglement in there, and I can't remember just what did happen.

Q. Did you go to Tullahoma?

A. Yes, sir, I was in Tullahoma.

Q. That was the principal office of the Cumberland Amusement Company?

A. There were some wires came in there to the manager and he had a check I understood, but he never approached me with a check.

Q. Who is this manager you are speaking about now?

A. A Mr. Davis.

Q. He was managing what?

A. Managing the Rogersville Theater for the Cumberland Amusement Company.

Q. Was that an opposition house the Cumberland had opened?

[fol. 952] A. Yes, sir.

Q. And you say he mentioned something about a check; did he make you a definite offer?

A. No, sir; I never came in contact with him, not that one; he might have contacted my son; I was out of town quite a bit at that time.

Q. Did you go to Tullahoma to talk to Mr. Hill, the president of the company?

A Yes, sir.

Q. Do you remember what time that was, at the time you wrote the letter?

A. No, sir, I do not.

Q. It was afterward, wasn't it?

A. I don't remember whether—Yes, it was afterward, I am sure.

Q. What was the conversation you had with him there?

A. I told him I wasn't doing any good, and it looked like I wasn't going to get any pictures and I said I would like to sell out to them.

Q. What did he have to say?

A. He says, You can go up to McMinnville and see Mr. Oldham I believe was his name.

Q. Cowan Oldham?

[fol. 953] A. Yes, sir; and he will carry you up to Nashville and you can see Mr. Tony Sudekum.

Q. Did you go over to see Mr. Oldham?

A. No; he was going to lunch and he says wait a few minutes and I will be back to see you after lunch; and I waited until 5:30; I had my wife waiting in Knoxville, and I got in the car and went back home.

Q. You didn't go to see Mr. Sudekum at Nashville at that time, then?

A. No.

Q. Now, was there a change of management in the Rogersville theater along in the latter part of 1937?

A. Yes, sir.

Q. Who took it over then?

A. Why, the manager came in and I talked to him and he said the Rockwood amusements in Nashville was taking over the Rogersville Theater; that was in 1937, along about Christmas, when he came in there.

Q. Did you have any conversation with the new manager about taking over your theater?

A. No, sir.

Q. When was the next time you talked to any one from Rockwood, Cumberland or Crescent about your theater?

A. It was during the year of 1938.

[fol. 954] Q. I say it was in the early part of the year?

A. No, it was along during the summer I think, along about July or August, I don't remember the exact date, I think as well as I remember.

Q. You think it was some time during 1938, the first part of the year?

A. Yes, sir.

Q. Who did you talk to?

A. I think the first man I talked to was a man by the name of Castelberry.

Q. When did you talk to Mr. Castleberry, when did you talk to him and where?

A. He came up to the theater.

Q. What was the conversation you had with him?

A. Well something about selling out, I don't remember the exact words.

Q. Do you remember the substance of the conversation?

A. No, sir, not word for word.

The Court: He said did you remember the substance of it.

Mr. Wright:

Q. I just want to get your best recollection, whatever it is?

A. He said a different company had the theater now, and that we should get together.

[fol. 955] Q. Did you tell him you wanted to sell?

A. I told him I would sell, things were getting worse all the time for me and I had to do something.

Q. Was that all the conversation you had then?

A. That is all I remember, we had more, but I do not remember just what.

Q. When was the next time you saw any one from Crescent Rockwood, or Cumberland?

A. I believe I had some correspondence during that time, I lost all my correspondence.

The Court: You say you are from Rogersville?

A. Yes, sir.

The Court: Is that where Dave Hale lives?

A. Yes, sir.

The Court: All right, excuse me.

Mr. Wright:

Q. Where did you see Mr. Stengel and Mr. Baulch?

A. They came in to see me along in August I believe that was along in August.

Q. Shortly before August, 1938?

A. Yes, sir.

Q. What was the conversation you had with them?

[fol. 956] A. I made him a proposition to sell out to them.

Q. What was the proposition?

A. Well, as well as I remember it was twenty-five hundred dollars for my equipment and I believe I made him a proposition of two hundred and fifty dollars a month, the same as I made to take over the theater.

Q. What did they say?

A. I think as well as I remember I had a letter from Mr. Stengel, he made me a proposition.

The Court: Talk a little louder, even I can't hear you.

A. You want me to give you all my answer to that, as well as commissions?

Mr. Wright:

Q. So far as you can remember what the proposition was, give it to us?

A. He made me a proposition to pay me forty-five hundred dollars for the theater, of course there were some notes added in there, a thousand dollars down, notes for a thousand dollars each, a hundred dollars a month, five per cent commission over two hundred and fifty dollars per week taking out the cash night and the state tax of Tennessee.

The Court: That is over two hundred and fifty dollars a week, you mean two hundred and fifty dollars gross re-
[fol. 957] ceipts?

A. Two hundred and fifty dollars gross receipts.

The Court: Gross receipts.

Mr. Wright:

Q. And I understand you to say that in addition to the two hundred and fifty dollars before your percentage started they would add the cost of the bank and cash nights and local tax?

A. Yes, sir, that is what I stated on there.

Q. Did you accept that proposition? At that time?

A. Yes, sir, and they gave me the equipment.

The Court: Did that enable you to sell the equipment?

A. I got the equipment.

The Court: So you sold the equipment at this time?

A. Yes, sir—no, sir, not a thing, I didn't sell them a thing, I didn't sell them the key to the town, I would have to take a ten year proposition to stay out of the town, and I say so the only way I am doing, I can open up tomorrow and you can fire me tomorrow, and that was my proposition.

Mr. Wright:

Q. So it stands that if they did fire you, you could open up a theater in the town?

[fol. 958] A. Yes, sir.

Q. You did not make any agreement not to compete?

A. No, sir, it is this proposition I sold to them, I can put up a theater tomorrow whenever I want to, or they can fire me today if they want to. I don't think much of signing

up this ten year proposition no way, it don't amount to anything, if you want to get rid of a man.

Q. When this little theater was opened by Cumberland in the fall of 1936, what policy did it open up at?

A. Opened at ten and twenty-five cents.

Q. That was what you were charging in your house?

A. Yes, sir.

Q. During the time that they were in opposition to you, both policies stayed the same?

A. No, sir, they didn't run very long until they changed the policy.

Q. What was the change that was made?

A. It run a single night on Saturday, and doubled the feature.

Q. Changed from single to double on Saturday?

A. Yes, sir.

Q. What was the admission price was charged before noon?

A. They had a forenoon I think it was fifteen cents, and changed to ten and twenty-five, the same in the afternoon and night.

[fol. 959] Q. Was there any day they ran for ten cents?

A. They put on some ten cent nights, yes, sir.

Q. Any bank nights?

A. Yes, sir, a bank night.

Q. Had you been trying any evening ten cent admissions and bank night before that?

A. No, sir—I had ten cent nights, yes, sir, on Wednesday night.

Q. How about bank night?

A. I had never put in bank—yes, I had bank night when they opened up.

Q. When they opened up?

A. Yes, sir.

Q. Did you have one a week?

A. Yes, sir.

Q. Did they have one a week?

A. Yes, sir.

Q. Then was there any change in that policy after the Rockwood company took over?

A. Yes, sir, they put on two bank nights.

Q. The admission price stayed the same?

A. No, sir, they cut ten cents on Saturday.

Q. Matinee and evening?

A. Yes, sir.

Q. How many bank nights did you play then?

[fol. 960] A. One.

Mr. Waller: Your Honor please, we have a general objection to this testimony, I don't know whether Your Honor has ruled on it or not.

The Court: No, I have not ruled on it.

Mr. Waller: In addition to the general objection, there is nothing in the bills of particulars about that.

The Court: I am not quite ready to rule on it.

Mr. Wright:

Q. During the two seasons before Cumberland came in there, do you remember what feature products you were using?

A. (Refers to memorandum.) I was using Warner Brothers, Paramount, Columbia and Universal.

Q. I am talking about 1934-1935, and 1935-1936?

A. 1934-5 Fox, Paramount, RKO, United Artists, Columbia.

Q. Was 1934-5, and 1935-6?

A. Yes, sir.

Q. Then when the time to buy products for 1936-1937 came around, did you try to buy Fox Pictures again?

A. Yes, sir.

Q. Did the Fox salesman come around to see you?

[fol. 961] A. You know I had another theater at that time.

Q. Where was that?

A. In Sneadville, Tennessee.

Q. Where is Sneadville?

A. Sneadville is the county seat of Hancock County.

Q. How big is it?

A. How big is the county?

Q. How big is the town?

A. Oh about two or three hundred inhabitants. The car number is eighty-seven.

The Court: License plate?

A. Yes, sir.

Mr. Wright:

Q. Did the Fox salesman come around to see you?

A. Yes, sir, he came over to Sneadville.

Q. He came over to Sneadville?

A. Yes, sir.

Q. What was the conversation you had with him there, do you remember what it was?

A. No, I bought some product from him for Sneadville.

Q. Was anything said about buying Fox features for Rogersville?

A. I do not remember just what was said about the pictures at Rogersville.

Q. Did he offer you the 1936-7 pictures for Rogersville?

[fol. 962] A. No, sir, I think not.

Q. Did he tell you why he didn't offer them?

A. He said, I am going back, I don't know whether I will sell you for Rogersville, whether I can get the deal through for the Rogersville situation or not.

Q. Did he tell you why he had doubts about it?

A. Well he said it looked like they were going to lose a big deal with another company, to sell my just one theater, why they would lose quite a few theaters if he sold me, and there is quite a bit of money involved.

Q. Did you see him again after this conversation?

A. I believe my son came in here on that along about that time, he was helping me out with the Rogersville theater at that time.

Q. Did you go to the Fox exchange in Atlanta, to find out about the Fox pictures after you talked to the salesman in Sneadville?

A. Yes, sir, I was in Atlanta and went up to the Fox exchange.

Q. Whom did you talk to in there about it?

A. Well I didn't talk to any one, the manager at that time as well as I remember was on his vacation.

Q. Did you talk to any one else there?

A. No one that had any authority as I remember.

Q. While you were there, did any one offer you Fox pictures, for 1936-7, Fox features for exhibition in Rogersville.

[fol. 963] A. No. There are so many film companies, I sent in some contracts and applications there, I never did get them approved, I don't remember whether it was Fox, United Artists, it is hard to remember those things. The fact of the thing, I had my wife to burn all my letters up, excuse the expression, down in the basement, a lot of trash, a lot of trash that my wife burned up. If I had them I could

tell you more about it. Take three years when you are out of the business, you know, and keeping up with it.

[fol. 964] Q. You know you did not get any pictures, in 1936-1937, for your theatre?

A. No, sir.

Q. You had tried to buy them, hadn't you?

A. Yes, there might have been an application in, I am not sure about that, I don't know that.

Q. There might have been an application for them?

A. Yes. I am not sure about it.

Q. How about United Artists pictures for 1936-1937 season, did you try to buy those?

A. Yes, sir, I bought those.

Q. For 1936-1937?

A. Yes, sir, in other words, I bought—I made application but still I never received the pictures.

The Court: You mean you bought them but never did get them?

A. The contract wasn't approved by the New York Office.

Mr. Wright:

Q. You mean, you tried to buy them?

A. I tried. I made application for them, I don't know whether he even, the salesman, turned them into Atlanta or not.

Q. This correspondence may refresh your recollection; I will show you a letter here signed William P. Miller, addressed to United Artists Corporation, dated July 1, 1936.

A. That is the agreement all right.

[fol. 965] Q. That is the letter that you sent with the application and the numbers of pictures?

A. I signed the application and numbers of pictures, there isn't many pictures named on the application, but the numbers of the release would be so and so and stars around it.

Q. You signed that and they are referred to in your letter of July 1, 1936?

A. Yes, sir.

Q. I will ask you to look at this letter of July 30, 1936, from United Artists to you and ask you if that is the latter you received in reply?

A. Yes, sir, it is, yes, sir, that is the contract.

Mr. Wright: I will ask to have this letter of July 1, 1936 from Miller to United Artists marked as Government's Exhibit No. — and the reply of July 30, 1936, will be the next number of Government's Exhibit.

(Two letters marked, respectively, Government's Exhibit Nos. 66 and 67.)

(Recess.)

Mr. Wright: If the Court please, in order to try to speed up the proceedings, I had all of these exhibits, which I was going to offer marked and had them inspected by the other Counsel, but I haven't had time to get them back in order [fol. 966] and if I can have a few moments, I would like to put them back in the order I had them.

I would like to offer two Exhibits, that were just identified by Mr. Miller, the letter from Miller to United Artists, of July 1, 1936, and the reply by United Artists of July 30, 1936, and marked as Government Exhibits, respectively, Nos. 66 and 67.

Mr. Raftery: May I examine them?

Mr. Wright: I thought you had examined them.

Mr. Raftery: I haven't seen anything.

Mr. Raftery: Are you offering just the two papers, the two letters?

Mr. Wright: Yes. If you want them detached, they may be separated.

Mr. Raftery: We are not going to object to that, but we don't want to be construed as waiving the proposition that these documents are hearsay. That is, the Miller letter is not hearsay, but the letter written by United Artists is hearsay and we reserve the question of the competency of this type of evidence. What Government Counsel has been doing is to co-mingle the rule of law, that the admissions of a co-conspirator may be admissible against that conspirator [fol. 967] and some time later when the conspiracy is proven, they may be admissible against the other parties to the conspiracy. That doesn't relieve them of complying with the rule of evidence, that they must make the evidence competent.

The Court: No, it does not, but as I understand, this is an admission of the Defendant.

Mr. Raftery: Whether it is a defendant or not, they must prove the evidence by competent testimony. But as to these

documents, we are not objecting. I am merely wanting the record to show that there may be a point where we will press the objection, to comply with the rule to make the evidence competent and take it out of the hearsay classification.

Mr. Armistead: Furthermore, as I understand the law, when the effort is being made to prove a conspiracy by the introduction of correspondence, all of that correspondence passing between the parties should be introduced, because some other letter may have changed the situation entirely.

The Court: Well, I just don't know about that. There may be other letters, there may not be other letters. If there are other letters, I assume that you would have the [fol. 968] right to introduce them in evidence.

Mr. Armistead: They would have to be produced by the party calling for this one letter, all of that correspondence would have to be introduced.

The Court: Are you calling for any further correspondence?

Mr. Armistead: I am going to reserve the right to.

The Court: I will allow you to do that. But I don't see that this is in the class of hearsay evidence. It is a letter written by an agent of the defendant United Artists to this exhibitor. I don't understand that is hearsay.

Mr. Raftery: There are things in the letter that are of a hearsay character. I am not objecting to this because I agree with the government and will try to expedite the putting in of any correspondence we have and will avoid calling witnesses, if necessary.

The Court: All right. Go ahead with your letters.

Mr. Wright: A letter from William P. Miller to United Artists, dated July 1, 1936, addressed to Atlanta, Georgia, is as follows: (Reading)

[fol. 969] "Gentlemen:—In agreement with your representative today, I am signeng twenty-seven contracts to cover that number of pictures on your 36-37 product, the total amount of the 27 pictures to be $486.00 four hundred and eighty six dollars. Prices on the several pictures may be allocated as you see fit as long as the total of entire purchase remains the same.

Agreement also covers your series #2 Disneys @ $2.50 and your series #3 and #4 @ $3.00 each, to be played two or more per month as available.

Features are to be played within thirty days after notice of availability. Yours truly——"

Mr. Wright: Now attached to that letter as was taken from United Artists' files, was a salesman's report which Mr. Raftery has objected to and asked to have removed, which we are not offering now but which we will offer later on.

The Court: All right. You can read it when you offer it.

Mr. Wright: The reply from United Artists to Miller, dated July 30, 1936, is as follows: (Reading)

"Dear Mr. Miller: We regret to advise that we have been unable to secure approval of the contract signed by you on July 1st and given to our Mr. Creswell, as the Producers of [fol. 970] the various productions do not feel the rentals are commensurate with the value of the pictures in your town.

Of our 1936-1937 group of releases, you already have under contract the following: The Man Who Could Work Miracles, The Last of the Mohicans and the Chas. Laughton production, the title of which will be Rembrandt.

We are reserving a date on The Man Who Could Work Miracles for you, namely September 30th-October 1st, and as previously advised, you will be advised regarding this date as soon as we hear from the Home Office as to the national release date.

The other two pictures under contract, will be made available for your use just as soon as we have some definite information as to their release dated. Yours truly."

Mr. Wright: It appears from the United Artists' answer to the Interrogatories that of the 1936-1937 pictures that are referred to in the letter, 15 were never played, they were sold to the Cumberland Amusement Company under a blanket deal which covered the 15 pictures to Cumberland and included Rogersville. We have not been able to locate that contract. I have talked to Mr. Hayes about it and he [fol. 971] said he had not been able to find it, and it was not in the file turned over to us. However, we do have a record of the offer of the United Artists in the answers to our interrogatories 15 and 16, which shows the pictures that Cumberland played in the Rogersville Theatre in 1936-1937 season and the rentals paid for them, and I would like to read that into the record at this point.

The Court: All right.

Mr. Wright: During 1936-1937 season, Cumberland played at Rogersville Theatre 15 of the United Artists pictures at a rental of $261.75. The top price was $25.00 and the lowest price was $6.75.

The Court: How many: 15?

Mr. Wright: Yes.

Mr. Raftery: So that the record will be straight, the 27 pictures were offered and there is nothing in the record to show how many of that 27 were made or how many were released during that season. My recollection is that, during that season, we had about 15 pictures, that is all that were made.

[fol. 972] Mr. Wright: In any event, of those released during the 1936-1937 season, 15 were played under this contract with Cumberland in Rogersville. The total rental was $263.75 that was paid.

Mr. Raftery: That is one situation, with the Cumberland?

Mr. Wright: That is right.

Mr. Waller: Did I understand that for 15 pictures the total rental paid was $263.75 and the top price was what?

Mr. Wright: $25.00 was the top price and $6.75 the lowest price.

Mr. Raftery: Is that $6.75 paid for but not played?

Mr. Wright: Paid for but not played. The bottom price of those played was $12.50. The same answer to interrogatories filed by United Artists, if the Court please, shows that the pictures released during the 1935-1936 season that were played at Miller's Theatre, the Palace, 16 were played at a total rental of $295.00 paid for them. That the top price was $30.00 and the bottom price was $12.50. That was the preceding season.

The Court: Played by the witness' theatre?

Mr. Wright: Yes.

[fol. 973] The Court: How many were there?

Mr. Wright: 16 pictures, total rental paid was $295.00 top rental was $30.00, bottom rental was $12.50.

[fol. 974] Q. I will show you two more letters that have been marked Government's Exhibit No. 68, that is, a letter from you to United Artists at Atlanta, dated August 27th, 1926, and ask you if you wrote that letter.

Mr. Raftery: Excuse me, your Honor, for the record, so as to have it straight, the only $30.00 picture showed that

year was Charlie Chaplan's Modern Times, which was special. They other top pictures were $25.00, just the same.

The Court: Were you stipulating?

Mr. Wright: We can introduce the entire tabulation, as far as that goes.

Mr. Raftery: It is right in front of you.

The Court: If that is correct, I will let you put it in. If he doesn't put it in, you can.

Mr. Raftery: I am trying not to cross examine, Judge, if we can get the facts as they are.

Mr. Wright: Then this letter of September 8th, 1936 that is attached to this letter from United Artists to you. Did [fol. 975] you receive that in reply to the first letter?

A. Yes, sir.

Mr. Wright: I will offer these letters as Government's Exhibits 68 and 69 for identification.

(Letters so filed and marked).

The letter from Mr. Miller to United Artists says:

"In reply to your letter of July 30; As the contracts did not go through, I can not understand why Mr. Creswell has not been to see me again. I was in your office in Atlanta several weeks ago, and you and Mr. Creswell were out of town, and your booker stated that I would hear from you or Mr. Creswell soon. I would like to buy United Artists productions, if I could get any co-operation on your part, if you do not want to sell me please let me know, as I want to take the proper course to protect myself."

The reply to Mr. Miller is as follows:

"Received your letter of the 27th concerning United Artists product for next year.

"We are not in a position at this time to discuss product or terms with you for Rogersville, therefore, there is no necessity of sending Mr. Creswell in to see you until we are ready to take your applications.

"Kindest regards."

The Court: What is the date of those letters?

[fol. 976] Mr. Wright: The last letter written September 8th, 1936 and Mr. Miller's letter was written August 27, 1936.

The Court: What is the number of the exhibits, 67 and 68?

Mr. Wright: 68 and 69.

Q. Mr. Miller, here is a letter dated August 14, 1937 from you to Mr. Hays of the United Artists Corporation, Atlanta, Ga. Was that letter written on or about the date it bears?

A. Yes, sir.

Q. It was written about that date?

A. Yes sir, August 14th.

Mr. Wright: Before offering this letter I just had Mr. Miller to identify I want to offer one dated January 13, 1937 from United Artists to Cumberland Amusement Company, which has been marked Government's Exhibit No. 70, and which I just showed to Mr. Raftery. The letter dated January 13th, 1937 says:

"Booking notices have been mailed you covering the feature bookings listed in your letter of January 7th.

"In the last paragraph of your letter, you mentioned that Mr. Oldham wanted pictures of the 1935-1936 season in Rogersville, where we could not fill dates with the new pic- [fol. 977] tures.

"As you no doubt know, for several years prior to the time Mr. Hill bought our product we were serving your opposition at Rogersville regularly and they used every picture of the 1935-1936 releases with one exception, this being The Amateur Gentleman, starring Douglas Fairbanks, Jr. with Elissa Landi."

Mr. Raftery: The other paragraph is important.

Mr. Wright: "If you can use this subject in Rogersville either one or two days, we will endeavor to secure approval of a contract at $12.50. If this will be satisfactory with Mr. Oldham, please advise which date you prefer to use Amateur Gentleman."

The letter Mr. Miller identified reads as follows:—August 14, 1937, from him to United Artists, Atlanta, Ga.:

"Last July 1st, 1936, I signed contracts with United Artists for their 1936-1937 product with your Mr. Creswell. On July 30th, 1936, I received a letter from Mr. W. M. Richardson, stating that he was unable to secure approval of the contracts, as the various producers did not feel that

the rentals were not sufficient with the value of the pictures in this town. But no United Artists representative called again to see me, nor was there any correspondence offering the product again at a higher price.

[fol. 978] "This was very unfair to us, as we have been using U.A. for at least ten years, and instead of trying to sell us your product, you sold our opposition.

"If United Artists product is open for 1937-1938, I would like to try to make a deal with you for them, I can offer you without knowing what you will have, the following deal: 12 pictures @ $40.00 plus $3.00 score with 40% of gross receipts, 12@ $26.00 plus $3.00 score and the remainder at $13.00 plus $3.00 score.

"Please advise at once about this deal, and why you can not serve United Artists pictures to me. Advise as man to man. As you know we have always played all contracts and caused no trouble."

After you wrote that did the United Artists salesman come around to see you?

A. No, I don't remember that they did.

Q. You say you don't remember?

A. No. That was 1936-1937?

Q. This relates to 1937-1938 pictures.

A. No, they never come around.

Mr. Wright: I will offer in evidence a series of four contracts for twenty United Artists 1937-1938 releases made between United Artists and J. L. Davis, manager of the Rogersville Theatre at Rogersville, Tennessee, dated Octo[fol. 979] ber 15, 1937, under which the pictures were sold and played out. That is marked as Government's Exhibit No. UA-1.

By the Court: What do the prices those pictures were given them at, how do they compare with the prices offered in this letter?

Mr. Wright: They are substantially lower. The top license fee in this contract was $32.50 and the bottom license fee specified in the contract is $17.50.

The Court: What is the date of that contract?

Mr. Wright: That is dated October 15th, 1937.

The Court: What is the date of Mr. Miller's letter?

Mr. Wright: Prior to that, August 14th, 1937.

At this time I would also like to read in evidence here the figures on the pictures actually played and the film

rentals paid for them by the Rogersville Theatre for the 1937-1938 season.

Mr. Raftery: Excuse me, your Honor, I don't think Mr. Wright meant to misstate the situation about these con-[fol. 980] tracts. In these contracts you have thirteen at $32.50; you have two at $25.00; you have one at $20.00; you have two at $27.50 and two at $17.50, which, I think simple addition will show, was a better offer than the offer suggested. We don't think that is material in this inquiry because we still have the right to sell these pictures for any prices we see fit but nevertheless that is a fact.

Mr. Wright: I don't think we need to argue the mathematics of it now. We take it the contracts on their face fully compared with his will show that the offer he made is better than the one that they accepted from the Cumberland Amusement Company.

United Artists' answer to the Government interrogatories shows played off at Rogersville for the 1937-1938 season—that they played seventeen and paid a total of $372.50. Those were listed in error in the column "Sold to independents" because it appears that they all played, in the same tabulation, that they played at the Rogersville Theatre, which was the Cumberland house.

[fol. 981] Mr. Raftery: We consider that an independent situation; in fact, we consider every exhibitor involved in this lawsuit as an independent. There is a very definite definition of affiliated exhibitor; that is one affiliated with a producer or distributor. There are not any of that type in this case at all; they are all independents. However, in this situation we classify this as an account separate from Sudekum, because we did our business with two men—Davis and a man named Hill, whom our records showed were not affiliated with Sudekum; but we have checked up since and have been informed by various matters in this case, that there was some affiliation of Hill and Sudekum. However, I would like to go back and straighten out that answer of Mr. Wright's in the 1935-1936 situation. In 1935-1936, the picture "Modern Times," a Chaplin picture, made a $30.00 rental; but the two top pictures were two at $25.00; next to that $30.00, and then they come down very rapidly to $12.30. In the next year, 1936-1937, which was referred to, there are one, two, three, four, five, six at $20.00 and then they come [fol. 982] down the scale the same way to that $12.50.

Mr. Wright: We want to put in a duplication for the 1935-1936-1937-1938 seasons. But what we want to clear up now is this statement that elicited those figures. That is an independent? I take it there is no question about that?

Mr. Raftery: Oh, no; it is an independent—the Cumberland, 17 pictures. The total amount paid for them was $372.50; the top price was $32.50 and the bottom price was $10.00.

Mr. Wright:

Q. Mr. Miller, here is a letter from Mr. Wilson to you on October 3, 1936, I will ask you to read that and say if that was received by you on or about that date?

A. Yes, sir.

Q. And the Mr. Fairchild that is referred to there, do you remember who he was?

A. He was a salesman.

Q. The Fox salesman?

A. Yes, sir.

[fol. 983] Q. That is Government's Exhibit No. 72, a letter of Mr. Wilson, the Atlanta Exchange Manager, to Mr. Miller, and the letter reads as follows:

"DEAR MR. MILLER:

This will acknowledge your letter of October 1st and upon receipt of your previous letters I forwarded them to our sales representative, Mr. Fairchild.

On his last visit into East Tennessee he tried to get into Rogersville but, because of a detour and unfortunately it was raining that day, he was advised that the road was practically impossible and he could not get into the town.

His trip at that time was to advise you that we were entering negotiations with the Hill Circuit for our 1936-1937 product. Since then that deal has been closed and the contract approved."

Now, Mr. Miller, can you say definitely whether Mr. Fairchild, on any of these previous visits, had ever offered you Fox pictures for that season?

A. No, sir.

Q. Well, do you say that you know he did not?

[fol. 984] A. No, sir, I couldn't say definitely.

The Court: He said he couldn't say definitely.

A. If he did I don't remember it.

Mr. Wright:

Q. Well, you would remember it if you got them?

A. I tried to get them, to tell you the truth about it.

Q. I beg your pardon?

A. I tried to get them and I couldn't; even couldn't talk with him; he would drive around town all the time.

The Court: You say he would drive around town?

A. Yes, sir.

Q. Around Rogersville?

A. Yes, sir; drive around the town, you see, around the town.

Q. Oh, he couldn't get there for a detour?

A. (No answer. Witness smiles.)

Mr. Wright:

Q. Now, I will show you a letter dated April 26, 1937, *April 26, 1937,* from you to RKO Pictures, at Atlanta, Georgia, marked Government's Exhibit No. 74. Did you write that letter at or about that date?

A. Yes, sir.

[fol. 985] Q. And then here is a letter from you to the same parties, dated July 4, 1937; did you also write that one at about that date?

A. Yes, sir.

Q. And a letter dated July 6, 1937, from RKO to you acknowledging that letter; did you receive that on or about that date?

A. Yes, sir.

Q. And a letter dated July 29, 1937 from you to RKO; did you write that on or about that date?

A. Yes, sir.

Q. These letters which I have just asked about are identified as Government Exhibits 72 to 77.

Mr. Ballew: You skipped 73.

Mr. Wright: Well, it will turn up later perhaps. The first letter, dated April 26th, from Mr. Miller to RKO in Atlanta, reads as follows:

> "We want first chance to contract your 1937-38 product. We have interduced your pictures and stars in this town, and feel that we should have first choice.

[fol. 986] "Please send your representative, Mr. Salley to see me at once, or advise at once definitely whether or not, your product for 1937-38 will be available for me.

It is very important that we have a definite reply from you at once. Please give this matter your prompt attention."

The Court: Who is that letter from?

Mr. Wright: From Mr. Miller to RKO in Atlanta. The next letter is Government's Exhibit No. 75, also from Mr. Miller to R. K. O. in Atlanta, dated July 4, 1937, reads as follows:

"I have written you several times requesting that you send your representative, Mr. Salley to see me regarding the 1937-38 product. Your excuse heretofore has been to wait after the convention, as the convention is over, I am looking forward in seeing Mr. Salley, in the next few days in Rogersville, with a proposition for me to buy your 1937-38 product."

And a letter of July 6, 1937, which is a reply by RKO [987] to Mr. Miller by R. K. O. as follows:

"Acknowledging receipt of your letter of July 4th, please be advised that we will have Mr. Salley call on you within the next week or ten days."

The next letter is from Mr. Miller to RKO, dated July 29, 1937, as follows:

"Dear Mr. Lyons:

In looking over my correspondence, I find that *that* I have a letter from you stating that Mr. Salley would call on me between July 6th and 20th. At this writing Mr. Salley has not called on me.

You have not even made me a proposition to buy your 1937-38 product.

If you or your representative does not make me an offer for your new product within the next few days, it will — necessary for me to contact your home office."

Q. Now, Mr. Miller, did you hear anything from Mr. Salley after that?

A. Yes, sir, he came in after that.

Q. How much longer was it after that?

A. I don't remember just how long, but he came in and [fol. 988] told me he would sell me half of the product, one-half of the product, that that was the best he could do; that if they sold me any more than that they would be knocked out of the proposition that would make them more money; in other words, they would lose a deal with some other company; he didn't say who it was. He would let them have half of the product and my situation half of the product.

Q. And you tried to buy all of the product?

A. Yes, sir.

[fol. 989] Q. Any discussion of prices?

A. Yes, sir.

Q. What was the price discussed?

A. Price for the product, discussed it.

Q. Was there any objection on his part to the prices you offered for all the product?

A. I don't know about that, about all the product.

Q. I am talking about the prices for all the product?

A. I am a little bit tangled up I think there, there are so many companies I can't remember all of them.

Q. You know you only bought half the product for that year?

A. Yes, sir.

Q. Terms were not discussed for the other theater, were they?

A. No, sir, not as I remember.

Q. You recall you were able to buy Warner for the 1936-7 season after you had lost Fox and United Artists?

A. Yes, sir.

Q. I show you this contract of November 16, 1936, for the exhibition of the Warner 1936-7 features at your theater in Rogersville?

A. Yes, sir.

Q. Did you sign it on or about that date?

A. Yes, sir, that is my signature.

Q. I believe it shows it was signed by you on November [fol. 990] second, 1936, and approved by Mr. Sears on November 16th?

A. Yes, sir.

Q. Then did you try to buy——

Mr. Pepper: How many pictures in that contract?

Mr. Wright: You have here approved pictures offered sixty, approved licenses sixty.

Q. Did you try to buy the Warner Pictures the next year?

A. Yes, sir.

Q. I show you this application for Warner Pictures attached to a letter dated September third, 1937, from you to Mr. Vergesslich, at the exchange in Atlanta; can you look at the application and tell me if that is the application you made?

A. Yes, sir, that is the application.

The Court: For what season is that?

Mr. Wright: That is 1937-1938. That is part of the contract that has just been identified.

Q. And you wrote this letter to Mr. Vergesslich?

A. Yes, sir.

Q. Enclosing the application at or about the date that appears there, September third, was written by you and [fol. 991] you made the application; look at the date on your application, and I think you may be able to answer that.

A. About two or three months.

Q. The applications are dated May 29, 1937; is that at or about the time those were signed and sent in?

A. Yes, sir, just started the selling season, the next year product.

Mr. Wright: I will offer this as Government's exhibit W-3 and the application, the application and letter you have separately marked, this is W— for identification, I think should be placed on the application, we have been marking letters that are not attached with Government numbers, and you can give the letter whatever that missing government number was. The application is marked W-4.

Mr. Pepper: The other contract, the Warner Contract?

Mr. Wright: This is W-3, put the W-4 on the application, and give the government number to the letter, give the letter a government exhibit number.

(Marked by clerk.)

Mr. Wright: I offer in evidence Government's exhibits W-3 and W-4, the contract and application, as government's exhibit number 78 the letter of September third.

[fol. 992] Mr. Wright: The application, I will not read that; the letter from Mr. Miller to the Vitagraph exchange at Atlanta, dated September third, 1937, reads as follows:

"As you know, I signed contracts for your 1937-1938 product several months ago. At this writing I have not had a rejection or approval of the contracts. Last week my son talked with you, and he states that you stated that the matter is entirely in New York's Home Office hands.

"I would appreciate some definite answer as to these contracts, as I wish to buy other product if I do not get Vitagraph.

Yours truly, ——."

I would like to offer that in evidence, contract for Cumberland Amusement Company for the year 1937-8, contract, application dated August 23, 1937, accepted September 8, 1937, government's exhibit number W, whatever it should be, W-5 I think you just marked it five.

And I will show you a letter dated September 6th, from Mr. Vergesslich, branch manager of the Warner Brothers exchange, and ask you if you received that letter, on or about that date?

[fol. 993] A. Yes, sir.

Q. I will offer this letter as government exhibit number seventy-three. The letter I have just offered reads as follows:

"Dear Mr. Miller: Answering your letter of September 3rd, relative to contracts signed for the 1937-38 product, please be advised that our Home Office has turned down your contract, as they have made a deal with the entire Sudekum Circuit, which covers this town.

Yours very truly."

Q. I will ask you after you made this application for the 1937-38 season pictures, if a Warner Salesman called upon you to go over matters there, or discuss prices with you?

A. No, sir.

Q. Mr. Miller, were you able to buy Universal 1936-7 features for your theater?

A. Yes, sir.

Q. I show you this contract, marked Government's exhibit W-1, that is identified with that number, April second, 1937, and ask you if that is a copy of the contract you made?

A. Yes, sir.

Q. Do you remember how you happened to buy that so late in 1936-7 season?

A. Mr. Elliott came in late in the season and sold them to us.

[fol. 994] Q. Had you been trying to buy them earlier?

A. Yes, sir.

Q. Did he tell you why he had not been able to sell them to you earlier?

A. Said they were not able to make the right kind of a deal with my opposition.

Q. That is what he told you when he finally told you?

A. Yes, sir.

Q. What had he been telling you earlier in the season when you had been trying to buy them?

A. Well I don't remember the exact words, but any way I couldn't get the product, the time that I did buy them.

Mr. Raferty: Will you stipulate that this may never apply to Universal, stipulate on the record that this man never played a Universal Picture during that time?

Mr. Wright: I don't know.

Mr. Raferty: You made your investigations of these records.

[fol. 995] Q. Now, after you signed that contract for the 1936-1937 pictures, did you try to buy 1937-1938 product of Universal?

A. Yes sir.

Q. They had some big pictures coming out for 1937-1938 that you were particularly interested in, did they not?

A. Yes sir.

Q. "Magnificent Obsession", "Imitation of Life", and "Showboat"? Do you remember those?

A. Yes sir.

Q. Did they make any offer to sell those to you?

A. I don't remember about those three pictures. They were special pictures, sold under a separate contract, as well as I remember.

Q. Did you try to buy them?

A. Yes sir.

Q. What did they tell you was their reason for not selling them to you?

Mr. Raftery: What year was that?

Mr. Wright: 1937-1938.

Mr. Raftery: What are the pictures you are talking about?

Mr. Wright: "Showboat", "Magnificent Obsession", and "Imitation of Life."

Mr. Raftery: In the answers to Interrogatories of Universal I do not find those pictures mentioned.

[fol. 996] Mr. Wright: They evidently made a contract for them and made a release of some.

Mr. Raftery: I do find several years back the picture Magnificent Obsession was made, in 1934, and it was released.

Mr. Wright:

Q. Were those pictures offered to you?

A. This is kind of a memory test to me. I will tell you, we bought some old pictures in there from different companies because I needed them to operate my shows, right along at that time from Warner and Universal and all of them, anything I could get hold of to fight our competition to try to stay in business.

Q. After you made this deal in April, 1937, for the 1936-1937 Universal pictures, did they offer you any of their 1937-1938 product?

A. I do not remember.

The Court: He says he does not remember.

Mr. Wright:

Q. Did you answer that?

The Court: Yes sir, he said he did not remember.

Mr. Wright:

Q. You remember, don't you, Mr. Miller, that you were [fol. 997] making every effort to get pictures at that time?

A. Yes sir.

Q. Can't you recollect—You recall, don't you, that you were not able to get Universal pictures for the 1937-1938 season?

A. We tried to get them, but I don't remember what they said about it now. I tried to get them, we tried to get them from all of them and it would have been a poor business man that wouldn't; we tried to get pictures to keep the house going.

Q. Prior to the tiie that Cumberland Amusement Company opened the opposition house there, about how much had you been making out of your theater?

Mr. Armistead: We object to that.

The Court: Objection sustained.

Mr. Wright: I think we are entitled to show, Your Honor, what the effect of that was, after the Cumberland bought.

The Court: It might be for a whole lot of reasons. He stated after the opposition theatre opened at Rogersville, that he had a hard time and he was losing money all the time and finally, as a last effort, decided to sell out.

That is right, isn't it?

A. Yes sir.

(Recess to 1:30 P. M.)

[fol. 998] Afternoon Session

The Court: Have you finished with the direct examination?

Mr. Wright: I want to ask one more question.

Q. After your theatre was sold to Rockwood, it was closed, was it not?

A. It was what?

Q. I say, after you sold the Palace Theatre to Rockwood, the Palace Theatre was closed, wasn't it?

A. Yes sir.

Q. It is still closed?

A. Yes sir.

Q. How long after you sold it was that? A few days or a week?

A. Well, it was closed on the night that I sold out.

Cross-examination.

By Mr. Waller, for Defendants:

Q. Mr. Miller, did you own that building, or merely lease it?

A. I leased the building.

Q. You closed that theatre yourself and sold the equipment to Rockwood, didn't you?

A. No sir, they assumed the contract on the lease until [fol. 999] they could move the equipment out of the old Palace Theatre.

Q. In any event, it never was operated after this trade was made?

A. No sir.

Q. You moved into that building—What?

A. I want to change that just a little bit, that isn't right. I had a lease on it and Mr. Stengel asked me to see the owners of the building and see if he could lease the equipment in there, said he would pay the rent until the equipment was moved out, which Mr. Stengel done, or the Rockwood Amusement Company did.

Q. You moved into that building in 1933, did you?

A. Yes sir.

Q. What had that building been used for?

A. It had been used for a furniture store room.

Q. Storage room?

A. Yes sir.

Q. It was an old tobacco warehouse, wasn't it?

A. No sir, it was built specially, it was built for a kind of classy rooms for displaying furniture for a big hardware concern.

Q. It was not built for a theatre?

A. No sir.

Q. When you leased it in 1933, did you move your equipment from the other theatre into it?

[fol. 1000] A. No sir.

Q. Bought new equipment at that time?

A. Yes sir.

Q. What sort of a heating and cooling system did you have in it?

A. I had steam heat with forced air, the same as you have in here, something similar to it.

Q. Was that heating system, what did that consist of?

A. Consisted of a boiler and two large heating units and a 20,000 cubic feet per minute fan driving air through these large heating units to heat the house.

Q. What was the seating capacity of the theatre?

A. I, at first, had four hundred seats, and then I put in more seats, my business increased the latter part of 1934 and I put 50 more seats in.

Q. How many did that make?

A. That made 450 seats.

Q. Now, when you opened that theatre, how many days a week were you running?

A. Running 4 days.

[fol. 1001] Q. What year was it that the Cumberland Amusement Company started building a theatre there?

A. 1936.

Q. Wasn't it 1935 or was it 1936?

A. 1936, as far as——

Q. Now, when you were operating the theatre four days a week what companies were you dealing with? What product were you buying?

A. I was using Paramount, Fox, Columbia, RKO and United Artists.

Q. Now, when you were operating four days a week how many changes was that a week?

A. Four changes.

Q. Changed every day?

A. No, three changes a week.

Q. Was one of those Westerns?

A. Yes sir.

Q. Then there were two changes of these major companies?

A. Yes sir.

Q. And that would be a hundred and four pictures a year fifty two weeks in a year?

A. Well, that is the major companies you are talking about now. I bought some independent pictures at that time. I understand they are not in this at all.

Q. Well, then, that would be less than a hundred and four pictures a year of the major companies that you were using?

A. I used about a hundred and fifty two to a hundred and [fol. 1002] sixty a year.

Q. That is when you were having three changes, wasn't it?

A. Yes.

Q. Now, when you only had two changes a week, plus Westerns, you were only using a hundred and four?

A. Well, most of the major companies made Westerns to-at that time.

Q. Well, leaving out the Westerns, if you were changing twice a week that made a hundred and four?

A. Yes.

Q. Feature pictures, didn't it, a year?

A. Yes sir; that is what it would figure.

Q. Then later on you changed to three changes a week?

A. Yes.

Q. Now, you stated you used Paramount, Fox, Columbia, RKO and United Artists. You don't mean you were using the product of each of those companies every year?

A. Yes sir.

Q. Using part of the product each year then?

A. I used all the product from each company but I would run over into the next year. You see, I would run into the next year with the old product and then buy again from them.

Q. You mean you would make a contract for that season's product and then at the end of the year you hadn't played it off?

[fol. 1003] A. If I didn't play them off I had to pay for them anyway. I paid for some of them and didn't play them.

Q. Didn't you sometimes get a new contract with the understanding that you were to have those others cancelled off?

A. No, I had to pay; very few pictures cancelled. I have had a few; I don't remember what companies. Very few pictures have ever been cancelled off of my contract.

Q. But you would play these pictures in a subsequent season sometimes, is that what you mean?

A. Yes sir, the next season.

Q. Instead of playing them during the current season?

A. Yes sir.

Q. Then the next year when you were playing off some pictures that you had bought the previous year you would have to cut down on your product from the other companies, wouldn't you?

A. No, buy all or none.

Q. Now, what I mean is, Mr. Miller, you weren't using in one year all the product of the five major companies?

A. Well, perhaps I wouldn't buy from all those companies every year, which I didn't, I guess.

Q. Well now, take Fox, for example, what years did you use Fox, starting with 1933? Do you have a memorandum of that?

A. No sir.

Q. Well, wasn't 1935 or the 1935-1936 season the first [fol. 1004] season you had used Fox pictures in four or five years? Do you remember about that?

[fol. 1005] A. I always used Fox at any time that I could buy them reasonable enough to make a profit on them; in any year if they were too high, why, I bought something else.

Q. Do you remember whether or not you actually used Fox product for several years——

A. Yes, yes——

Q. Wait a minute; I didn't finish my question——

A. —For years and years.

Q. I want to ask you——

A. But I missed years.

Q. You missed several years perhaps before 1935?

A. Yes, I missed years where I couldn't get a suitable contract with them and got a better contract from the other man.

Q. Every year what you would do was to shop around and get the best pictures from suitable companies?

A. Yes, sir, if they had suitable pictures for my town.

Q. You wanted suitable pictures for Rogersville?

A. Yes, sir.

Q. And the result was that one year you would have the product of one company and another year the product of another company?

A. Well, not always.

Q. Well, you certainly had Paramount, didn't you, every [fol. 1006] year?

A. Yes, sir.

Q. And what other companies did you have every year?

A. I used Paramount and Columbia.

Q. And then you alternated on these other companies?

A. I used Fox most of the time.

Q. You did use Fox in 1936-1937; you are clear about that—No, I take that back: I think it was 1935-1936?

A. 1935-1936.

Q. It was 1935-1936 you had Fox, wasn't it?

A. Yes, sir.

Q. And that same year you had Columbia?

A. Yes, sir.

Q. And that same year you had Paramount?

A. Yes, sir.

Q. Well, that would make right there 156 pictures?

A. Well, you take 1935-1936: I was running four changes a week along in there, 1935-1936.

Q. How many changes a week in 1935-1936?

A. Four changes a week.

Q. One Western and three other changes.

A. Sometimes on Saturday it wouldn't be a Western; I am looking through my book here, and I notice I didn't run a Western every Saturday.

[fol. 1007] Q. Well, did you ordinarily run a Western on Saturday?

A. Yes, sir.

Q. Did you have some trouble with Fox in 1935-1936 about booking; did you have a complaint against them?

A. I don't remember about that. It seems the shows were going right along here, two every week, sometimes two a week, of Fox.

Q. You don't remember any controversy with Fox about booking pictures.

A. No, sir.

Q. Well, in any event, in 1936-1937 you didn't have Fox?

A. No, sir.

Q. Did you have any talk or conversation with a Fox representative about buying the pictures for both Sneedville and Rogersville?

A. Yes, sir.

Q. Now, what was that?

A. Well, I bought the pictures for Sneedville; we were over at Sneedville, and Mr. Fairchild told me he didn't believe he would be able to sell me 1937-1938—I mean 1936-1937—for the Rogersville situation.

Q. Well, did he tell you he wouldn't sell you for Rogersville unless you also bought for Sneedville?

A. Yes, sir.

[fol. 1008] Q. Now, when was that?

A. Well, that was about the same time; that if he sold us for Rogersville it would have to be for both situations, and I would have to add in one of the company's rules, that I wasn't using some more product.

[fol. 1009] Q. I believe you said that in 1936-37 you bought the Warner Brothers products?

A. Yes, sir.

Q. Had you ever used Warner pictures before that?

A. No, sir.

Q. Had you ever had a full deal in that within the last few years?

A. No, sir.

Q. Were Paramount and Columbia the only two companies with whom you had been making a deal each year for the season's output?

A. Yes, sir, and United Artists, I guess was the pictures I always bought something from the United Artists every year.

Q. You bought a few pictures every year?

A. Yes, sir, they had a system of selling them different from other companies, they would sell you one picture if you wanted it, but later years they got to be all alike, all of them like the other companies and you were not buying the seasons output.

Q. But you were not buying the season's output of the United Artists?

A. No, sir, not every year.

Q. Were you in addition to using current pictures, Mr. Miller, making it a habit there in the operation of your theater of getting some of the older pictures which had [fol. 1010] been good and playing them?

A. I did up to the last, just before I sold out, but I hadn't been in the habit of doing that.

Q. You never had to close your house on account of not having pictures?

A. Well it was coming to a point where I would not have and that is why I got rid of the house, went out of business, I saw I was going to come to it, and there wasn't room for two shows at that time.

Q. In 1937-38 you had a deal with Fox that year?

A. Yes, sir.

Q. That was the last season you were there?

A. Yes, sir.

Q. You had a deal with Paramount?

A. Yes, sir.

Q. You had a deal with Columbia?

A. Yes, sir.

Q. You had half of the RKO pictures?

A. Yes, sir.

Q. So you had the entire output of Paramount, Columbia and a split deal with RKO?

A. Yes, sir.

Q. Did you have independents in addition to that?

A. Yes, sir.

Q. What independents were you dealing with that season? [fol. 1011] A. We were picking up from the Monogram, the Republic, Southern Monogram I believe they call it—Republic.

Q. Well if you had the entire product of three major companies and half the product of RKO in addition to these Monogram pictures and other independent pictures, you had plenty of pictures didn't you, Mr. Miller?

A. I had plenty of pictures at the price.

Q. Price was too high?

A. Yes, sir, but I had to buy them, I was up agin it; in other words when I didn't have competition I could go around and play, I could make it over and come down right you see, make them get down right, and if they didn't I could buy from the other company; after I got competition I had to buy from them, and all my letters and correspondence here shows that I did, that I was trying to buy anything that I could, and pay any kind of a price to get pictures to keep my house open.

Q. In other words, when there are two theaters in a town bidding against each other, it means that the price goes up?

A. That is what it done.

Q. Did you ever trade horses?

A. No, I never traded in horses.

Q. What is the seating capacity of that new Rogersville theater you are managing now?

A. Around six hundred and fifty.

Q. You said that your management contract there pro- [fol. 1012] vided for a fixed salary and then a percentage?

A. Yes, sir.

Q. Over and above what was it, what was the percentage?

A. Over two hundred and fifty dollars a month, plus bank night and state tax.

Q. You mean you take out the bank night prize?

A. Yes, sir.

Q. Before you figure your percentage?

A. And the state tax.

Q. And the state tax?

A. Yes, sir.

Q. But you got your percentage on your seats for every night, you didn't call it bank nights, that is your percentage contract?

A. Yes, sir.

Q. And that has been the trade you have had all along?

A. Yes, sir.

The Court: Still having bank nights?

A. Yes, sir.

Mr. Waller:

Q. You mean you are having bank nights up there, when there is only one theater in the town?

A. Yes, sir, one bank night.

Q. Did you ever have a bank night before the Rogersville theater opened?

[fol. 1013] A. Yes, sir.

Q. That Cumberland Theater?

A. Yes, sir,

Q. Did you ever have a dime night before you had opposition?

A. Yes, sir.

The Court: He has testified to that.

Mr. Waller:

Q. That kind of attracts them to the theater?

A. Yes, sir.

Q. Now getting back to your theater, how much did you spend on remodelling that back in 1933, fixing it up as a theater?

A. Fifteen hundred dollars.

Q. Your heating system, were there not some thresher boilers you put in there for a heating system?

A. My heating system is separate from the building.

Q. Separate from the building?

A. Yes, sir, and far apart from the house? It is in a fireproof building.

Q. Sir?

A. It was in a fireproof building twenty-five feet from the main auditorium of the house.

Q. Just explain what that heating system consisted of?

A. My boiler was a twenty horse power threshing machine boiler, high steam pressure gauge taken off, low steam pressure gauge put on for twenty-five pounds.

Q. You rigged that up yourself?

[fol. 1014] A. Yes, sir.

Q. Did you have any rest room facilities?

A. Not right in the house, not right in the theater, when I bought it and put it in condition I had no sewerage pipe next by the theater, runs right by the theater, but I couldn't get a connection. That was why it was not put in. Next door.

Q. That Rogersville theater you are managing, now, that is an up to date theater building and built for a theater?

A. Yes, sir.

[fol. 1015] Cross-examination.

By Mr. Frolich, for Defendants:

Q. You made a contract each season for Columbia Pictures, didn't you?

A. Yes sir.

Q. From 1931-1932 down to 1938-1939, with the single exception of 1934-1935 season, you took the full product of Columbia for each of the seasons, didn't you?

A. I don't remember about that, I am not sure about that, I haven't the contracts.

Q. Suppose I show you these contracts. Will you be good enough to tell us whether it bears your signatures and whether they are the contracts you made with Columbia, commencing in 1932, down to 1938?

Yes sir, that is my signature. Of course, some of them was signatured by my son in my name, I gave him the right to do that.

Q. Does that refresh your recollection as to whether those are the contracts you had with Columbia?

Mr. Frolich: I would like to offer these as Collective Exhibit No. 36.

The Court: All right.

(Contracts marked Collective Exhibit No. 36.)

Q. Did you ever have any trouble getting Columbia's product?

A. A little bit, the last contract was a bit higher. They would sell me all right, but they boosted them up a little [fol. 1016] bit more than——

Q. But you signed the contract, didn't you?

A. Yes sir, I did.

Q. Then after you signed the contract, you sold out your theatre?

A. Yes.

Q. And you never played that contract through at all?

A. No sir.

Q. And you never paid Columbia a cent on that last contract, did you?

A. No sir.

Cross-examination.

By Mr. Raftery, for Defendants:

The Witness: There is one thing—can I say this?

The Court: Yes, go ahead.

A. There is one thing I left out, I didn't state, on that sale there, that Mr. Stengel received all of my old contracts, and that is in the deal, and I have a copy of the sale, he assumed all contracts.

Mr. Frolich:

Q. You didn't play it did you?

A. No, but I sold my theatre to him and he assumed the contracts, that is written in the contract, he is to take all, to assume all contracts that I haven't played. I didn't bring [fol. 1017] that down with me on account of I didn't think to bring it. I am going to have to pay that contract.

The Court: What?

A. I am going to pay that contract.

The Court: You say you are still operating that theatre?

A. Yes, for Mr. Stengel.

Mr. Raftery: Mr. Wright, did you offer in evidence that Universal contract that you were examining the witness about?

Mr. Wright: Yes.

Mr. Raftery:

Q. By the way, Mr. Miller, are British pictures, with English actors, popular up in your part of the country?

A. No sir, they are not.

Q. Getting down to this letter of August 14, 1937, you stated in this letter:

"This was very unfair to us as we have been using United Artists for the last ten years and instead of trying to sell us your product, you sold the opposition."

Is that your best recollection of the facts with regard to your dealings with the United Artists?

A. We had used some United Artists every year.

[fol. 1018] Let's see what you did use. If I showed you a list of United Artists releases for each year, would you recognize it? Let me try it, anyway. Starting with 1930-1931 season?

A. Let's start at 1933, when I went in business; Huh?

Q. When did you go in business?

A. 1933.

Q. How many pictures of United Artists did you buy in 1933-1934?

A. July 20 to July 4—I mean, July 1934 to July 4, 1935—

Q. I beg pardon?

A. From July 20, 1934, releases to July 4, 1935, we used, I believe I have used every one of those pictures, as well as I remember.

Q. As a matter of fact, didn't you state on your direct examination you started in that town in the theatre business in 1917?

A. Yes sir.

Q. And you were in the theatre continuously in that town from 1917 to 1933?

A. Yes sir.

Q. Isn't it a fact that for the calendar year or theatrical year of 1930-1931, when you were operating a theatre in that town, out of 15 or 18 releases of United Artists, you played 4 pictures. You played "Whoopee"—Look up [fol. 1019] there and see if you didn't play that?

A. I played "Whoopee" and "Abraham Lincoln".

Q. As a matter of fact, you didn't play "Hell's Angels" or "Bat Whispers"?

A. I played it but I didn't play "Bat Whispers", "One Heavenly Night", "Devil to Pay", "Reaching for the Moon", "City Lights", "Front Page"—I played just about all of those.

Q. You played all of those?

A. Just about, as I remember.

Q. That is your best memory?

A. But I don't know whether I played them all that year or not.

Q. Isn't it a fact in that year you played four pictures? When I say that year, I mean from that program, from that date, down to this date, only four pictures of that group that was released in that town, and they were "Whoopee", "One Heavenly Night", "Moulin Rouge", and "Hell's Angels"?

A. I haven't any record book that far back.

Q. You haven't got a record?

A. No sir.

Q. The next year you didn't play a single picture, did you, 1931-1932?

Mr. Wright: I thought that was the year you were just asking about?

Mr. Raftery: The next year, 1931-1932—Not a single [fol. 1020] picture?

A. No sir, I couldn't get together with them.

Q. You couldn't make a deal?

A. No.

Q. The next year, 1932-1933?

A. Oh, I played a part of those pictures, at the Palace Theatre, it might be later.

Q. Are you sure of that?

A. In later years.

Q. Are you sure of that? Isn't it a fact, Mr. Miller, that you never at any time, from the first date mentioned, down to today, played a single one of those pictures in the town of Rogersville?

A. I am going to turn that over to my son.

Q. Well, turn the page before you turn that one over to your son. Let's have the next year. What is the date of that?

A. August 4, 1932.

Q. 1932-1933, isn't it a fact you never, from that first date of release, down to today, played a single one of those pictures in Rogersville?

A. I will turn that over to my son.

Q. All right. The next year, on the 1st, which is all the releases of the United Artists for 1933-1934, isn't it a fact that the only one out of that entire group that you showed in [fol. 1021] that town was "Looking for Trouble"?

A. I don't think I played it. My son might remember about that.

Q. What is that?

A. My son might remember about that picture, if we played it.

Q. You might have been exaggerating a little bit in this letter about playing all the United Artists down in that town when you said for ten years you had been such a great customer, isn't that a fact, Mr. Miller?

A. I will turn over to 1934-1935, I always used United Artists, some United Artists.

Q. You didn't play some United Artists pictures in 1934-1935, isn't that the fact?

A. I played United Artists before that.

Q. Well, you played one in four or five years.

A. I played more than one in five years.

Q. Now, in this letter you also stated that you would like to buy the 1937-1938 program. Will you look over onto that page. I would like to call your attention to the fact that there are 23 pictures, plus 2 re-issues, that is the group of pictures you made the offer for in this letter, is it not?

A. Yes sir.

[fol. 1022] Q. You see here, "12 at 40 plus $3.00 score with 40 per cent of gross receipts." Which of the 12 in that group were you willing to pay $43.00 guarantee, against 40 per cent of the gross for?

[fol. 1023] A. Will you let me look at the signature on that letter, please?

Q. Sure. You are not going to turn that over to your son, are you?

A. He has authority and I told him to buy the pictures. My son signed the name to this, my name. Here is my signature and there is my son's. That is the way he writes it. You see the difference, I guess. I will turn it over to him.

Mr. Raftery: Then at this time we are moving to strike out all evidence—first, to strike the exhibit, and secondly, to strike whatever the evidence has been regarding this subject that is now turned over to the son.

By Mr. Wright:

Q. Isn't it a fact, Mr. Miller, that this letter which is dated August 14, 1937, which has your name to it, was sent at your instructions?

A. I told my son to make a deal with them. I discussed it with him and told him to make the deal with them.

Q. Is that the deal as set forth in that letter, the deal that you told him to make?

A. Yes sir. I told him not to pay over $40.00 and they would surely accept that; not to pay over $40.00 for their top pictures; for him to pick out the top pictures. I don't [fol. 1024] remember what pictures he picked out.

Q. This exhibit Mr. Raftery showed you contains the titles. Now, at the time the pictures were offered to you nothing like this was shown you?

A. No sir.

Q. What was offered you was just a list of in many cases untitled pictures, is that true?

A. Yes sir.

Q. And the actual pictures that are included in the deal later appeared in that talisman memorandum that is attached to that letter, is that correct?

A. Yes sir.

Mr. Raftery: Now, that Mr. Wright has testified, I am going to move to strike out all of it. In the first place, this letter, on its face shows it is just a letter written from Rogersville, Tennessee, not in response to any offer made by United Artists, as presumed by Mr. Wright, but a blanket offer made in the dark for United Artists' pictures, and I have asked this witness——

Mr. Wright: That is the way every offer for United Artists pictures is made.

Mr. Raftery: I beg your pardon; it is not, and I move to strike out the questions propounded by Mr. Wright [fol. 1025] and the answer made by the witness regarding this particular document as to the pictures offered by United Artists. There is no proof here that any pictures were offered by United Artists. It is just the opposite. The pictures weren't offered to this witness or to his son.

Mr. Wright: We will agree to that, if all the questions Mr. Raftery asked may be stricken relating to that docu-

ment, which has not been identified in any way or described prior to his——

The Court: Well, just strike it all out.

Mr. Raftery: Now, let me have the answers to the interrogatories you were examining him about. These were names of pictures taken from the answers to the interrogatories which Mr. Wright used, and for convenience, I gave it to the witness.

The Court: Well, if the letter is stricken out there is no use——

Mr. Wright: I wasn't referring to the letter. I was referring to the questions asked about this document here, this blue paper. I agreed that my questions on that document would go out if his questions relating to that document [fol. 1026] went out with the letter.

The Court: The witness didn't write the letter anyway.

Mr. Wright: The witness has stated that the letter contains the propositions that he instructed his son to make. Now, we can put him on the stand and have him testify that he wrote it, if that adds anything. I don't see that it does.

The Court: Let me see the letter. (Letter handed to the Court). I don't pay so much attention to the letter anyway. It looks like it is a proposition making a very attractive offer. It says: "I can offer you without knowing what you will have the following deal; twelve pictures at $40.00 plus $3.00 score." What does that mean "$3.00 score".

A. A $3.00 score charge is put on by the film companies to take care of this society of authors or composers or whatever it is—it is about a foot long. I don't believe I can tell you what it is. I guess you understand though.

Q. What was your purpose in having this letter written?

A. Well, Sir, I was just scared I wasn't going to get any pictures to operate the house.

Q. Did you know you were offering more than the pic- [fol. 1027] tures were worth?

A. Yes sir. And I wanted to stay in business if I possibly could and that is why I offered this proposition; I wanted to get pictures. I thought by offering them a price I could buy the pictures. Always before that they wanted the price and I paid the price.

Q. Did you instruct your son in writing this letter as to the amounts to offer for the pictures?

A. I told him not to offer over $40.00 tops and percentage.

Q. Did you tell him to offer $40.00?

A. Yes sir.

The Court: Well, I will overrule the objection to the letter and the rest of the evidence relative to or the questions relative to the program that were asked by Mr. Wright—I don't see that it makes much difference either way because this letter states itself "I offer you without knowing what you will have"—I don't see that the questions asked either by Mr. Raftery relative to which twelve pictures he meant or the questions asked by Mr. Wright in that connection, neither of them are material because the letter itself shows that he didn't have any particular twelve pictures in mind.

Mr. Wright: I think that is right, your Honor. I agree to that. I only wanted to be sure that this document here [fol. 1028] that he offered, which contains a list of pictures released wasn't used to give the impression that at the time United Artists' pictures are sold and offered that they are titled because they are not. In many cases they offer pictures that haven't even got a title.

The Court: I sustain your objection to his questions and I sustain his objection to your questions.

Mr. Raftery: I only have one question to ask.

Q. You never offered $40.00 apiece in all the years you were there for a picture, did you?

A. No sir, but I had used United Artists pictures and they made some pictures and I had bought some pictures that made me some money before that and I knew we could afford to pay that much money for the pictures because they had the reputation of making real pictures, twelve or fourteen a year, and I knew I could make money on their pictures is why I told my son to send in the order.

Q. Did you ever offer $40.00 for a United Artist picture before that letter.

A. No sir.

Q. As a matter of fact, $25.00 was the top price you ever paid for a United Artist picture on a flat rental contract, is that not the fact?

[fol. 1029] A. Yes sir.

Q. Except Charlie Chaplan's Modern Times, which you paid $30.00 for?

A. Yes sir.

Q. Is that the fact?

A. Yes sir, that is a fact because I could buy them for that price.

Q. And the British pictures you didn't want at all, did you?

A. No, I didn't want the British pictures.

Q. You knew a great portion of the releases for 1937-1938 of the United Artists were British pictures, did you not?

A. No sir.

Q. Well, you knew that before the season was over, did you not?

A. You mean this contract that I was writing about?

Q. Yes.

A. No, I didn't know what——

Q. Would you pay that kind of money for British pictures? I mean the lowest offer, the lowest amount in that letter, would you offer that for the British-made pictures?

Mr. Wright: If your Honor please, the letter speaks for itself; he made the offer without knowing what the pictures were. I don't see how his further testimony is going to enlighten us any more on that point.

[fol. 1030] Mr. Raftery: We didn't take the letter seriously. Your Honor, I would like to move to amend the answers to the interrogatories in connection with the town of Rogersville for the season of 1937-1938 so as to show that twenty three pictures, seven of which were foreign-made, played under the contracts of J. L. Davis in the Rogersville Theatre and the total film rental paid United Artists on the twenty three pictures for that season, that is, that particular season, was $496.00.

The Court: What does the answer show?

Mr. Raftery: $496.00 but shows it in two separate columns. It shows $123.50 in one column and $372.50 in the other. I have added the two together and checked it with the original records under the J. L. Davis contracts, who was the buying agent for a man named Hill. These contracts, these pictures played in that theatre and the total film rental paid was $496.00.

Mr. Wright: The Hill you are referring to is R. T. Hill, president of Cumberland Amusement Company?

Mr. Raftery: That is right.

The Court: Let it be amended.

[fol. 1031] Mr. Wright: We don't have any objection to his amendment if that is a fact but we would appreciate it in the future if he would make any amendments he wants to make to the answers before we put the situation on the stand.

Mr. Wright: I would like to ask him one question to clear up this matter of Sneedville.

Q. I believe you testified that you did buy the 1936-1937 Fox pictures for Sneedville, did you not?

A. Yes sir.

Q. You tried to buy them for Rogersville also and you couldn't, is that the fact?

A. Yes sir.

Further this witness saith not.

[fol. 1032] Afternoon Session

E. R. Perdue, called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Please state your name and address?

A. W. R. Perdue, Gadsden, Alabama.

Q. What is your occupation?

A. They call me a banker, I believe. I am President of a bank down there.

Q. Of what bank?

A. East Gadsden Bank.

Q. You are also President of the Etowah Amusement Company, are you not?

A. Yes sir.

Q. That is the Company that operates the Dixie Theatre there?

A. Yes sir.

Q. This map is an enlarged copy of Exhibit 82 of the City of Gadsden, a map that was produced by you?

A. Produced by the City.

Q. You got it from the City?

A. Yes sir.

Q. That is, as far as you know, an accurate map of the City?

A. Yes sir.

[fol. 1033] Q. I call your attention to the section in the Southeastern corner of the map with the red bar there, and the word "Dixie" is that the location of your theatre?

A. Yes sir.

Q. What is the area surrounding that called?

A. That is a mile and a half, I guess——

Q. I say, what is this area called?

A. It is called East Gadsden.

Q. East Gadsden, Alabama?

A. It goes by that name, yes sir.

Q. It is separated from Gadsden, the down-town part of Gadsden by the Coosa River?

A. That is right.

Q. Is this, those three red bars that are on the central section of Gadsden, marked Capitol, Princess and Gadsden, the respective locations of those three theaters?

A. Yes sir.

Q. Are those three theaters operated by the Crescent Amusement Company?

A. That is my understanding.

Q. I call you attention to the Western side of the map with a red mark, is that the location of the Ritz Theatre?

A. Yes sir.

Q. And the area surrounding the Ritz Theatre goes by what name?

[fol. 1034] A. Alabama City, it is called.

Q. And the city limits of Gadsden are those shown at the extreme edges of the map, are they not?

A. That is right.

Q. And both East Gadsden and Alabama City sections are inside the limits of Gadsden, proper?

A. Yes sir.

Q. Who else is interested in the Etowah Amusement Company besides yourself?

A. There are 14 stockholders.

Q. Who are they, where are they from?

A. From Gadsden, all of them.

Q. Employes of the Goodyear Plant there?

A. Ten are Goodyear officials and employes.

Q. How did you and these other people happen to build a theatre there?

A. Well, at the beginning, the theatre on that side—There was boys got interested and interested some parties in remodeling an old building of the theatre that was burned, and after it burned, then they got interested, themselves. The people kept insisting that there ought to be a theater on that side, so the Goodyear boys took it up and invited four outside men.

Q. When was this other theatre burned?

A. About, I guess, about two or three months before they started the move to put up a new building.

[fol. 1035] Q. When was that?

A. It was burned on January 21st.

Q. Had it ever operated as a theatre?

A. No.

The Court: What year was it burned?

A. 1939.

Mr. Wright:

Q. Had you ever had a theatre before in East Gadsden?

A. No sir.

Q. Go ahead then?

A. So, this one was burned and the move was still on, in other words, the people called for a theatre, and so then the Goodyear boys took the matter up and invited four outside men to join them. They invited me and a contractor, who did most of the contract work for the Goodyear Company, small contract work in their building, and a manufacturing Company there, the head of it, and the assistant City Engineer. In a sense, I was drawn in since most of the Goodyear men were banking with me and I could hardly deny taking some stock and going with them and, naturally, I was interested in having a theatre on our side of the town for the service and convenience of the people.

Q. When did you start work on the theatre?

A. The excavation began, I believe, about March or April.

[fol. 1036] Q. When did the theatre open?

A. September 2nd or 3rd, I believe.

Q. In 1939?

A. Yes sir.

Q. How much was put into that theatre property?

A. Our investment there is $21,600.00, approximately so.

Q. Will you tell us how you figure that?

A. Well, the building and lot and paving cost us, I believe, $11,160.00—I mean, $1160.00—I mean, $11,160.00 for the building and lot, too. The lot was $1160.00 and the building was approximately a little more than $10,000.00. Then our projection equipment was about $3800.00 I believe. The sound equipment was $2800.00, including using the equipment which we traded in at about $1,000.00. And the curtains and the screen, I believe, was $575.00 approximately. I don't know those figures just to the exact dollar.

Q. Now, can you tell us what the distance is from the Dixie Theatre to the down-town section of Gadsden?

A. It is between a mile and a half and two miles.

Q. How much farther is it from the down-town section of Gadsden to where the Crescent Theatres are and the East Gadsden Theatre?

A. I would say it is about two and a half to three miles.

Q. The total distance from the Western part, between [fol. 1037] the Ritz and the Dixie is about 5 miles?

A. Yes.

Q. Is there transportation facilities between them?

A. Yes sir, a bus line.

Q. You can go from one part to the other by bus?

A. Yes.

Q. How long does it take to go from the Dixie to the Ritz?

Mr. Waller: It would depend on how fast you went.

A. It would depend on the traffix.

Mr. Wright:

Q. Approximately, within what limit can you make it?

A. I would say from 20 to 30 minutes.

Q. Why was it that you and these other people got together to build that Dixie Theatre?

Mr. Waller: He has answered that.

The Court: He said there was a demand for a theatre over there in East Gadsden after the old theatre burned.

they still continued it and they got together, as I understood him.

A. I didn't get the question?

The Court: He asked you why it was that you all went into the theatre business over there, how did you get together—why did you get together?

A. There was a demand there. They claimed it was cost-[fol. 1038] ing too much to go to the Princess and it was too far to go over to the other theatre. They wanted something closer home that they could patronize.

Q. How many people live in that section of East Gadsden?

A. What is that?

Q. How many people are there in that area there?

A. Approximately 7,000, between 6,000 and 7,000.

Q. About what is the population of the whole town?

A. Of the whole town of Gadsden?

Q. Yes?

A. I believe they claim 40,000.

Q. What sort of residential area is East Gadsden as compared to Alabama City?

A. I don't understand your question?

Q. Can you tell us what the two residential areas that are respectively known as East Gadsden and Alabama City are like, what is their character?

A. Alabama City is made up of textile, cotton mill and steel plant employes and East Gadsden is made up of Goodyear employes, Goodyear Tire and Rubber Company employes mostly.

Q. Do most of those employes have cars?

A. What is that?

Q. Do most of them have cars?

A. I would say approximately 48 to 50 per cent have cars. [fol. 1039] Q. How about that situation with respect to those over in Alabama City?

A. I would think pretty much the same, possibly a little smaller number have cars, but pretty much the same.

Q. Did you have anything to do with the efforts to buy film for the Dixie Theatre after it opened?

A. I didn't understand you?

Q. Did you have anything to do with the attempt to buy films for the Dixie Theatre after it opened?

A. No sir. I have only been President since January 1st of this year.

Cross-examination waived.

Further this Deponent saith not.

Mr. Wright: Call Mr. Currey.

Mr. Waller: I take it the Government is proposing to go into the question of buying films for this theatre, which opened in September 1939, a month after this suit was filed, and we object to anything about it as being outside of the scope of the issues in this case.

The Court: Well, the same thought had occurred to me. Ordinarily a conspiracy ends, in a criminal case with the [fol. 1040] return of the indictment. Unless you wish to prove that a conspiracy was carried on, how can this be competent?

Mr. Wright: Certainly we are going to insist that a conspiracy continued right on down to the present time, so far as that is concerned and we gave them express notice we were going into the Gadsden situation.

The Court: Giveing them notice wouldn't make it competent from a legal standpoint.

Mr. Wright: No. I was just referring to any question of surprise that might be expressed. In the pleadings, we allege a conspiracy and a continuing one, that is why we ask to enjoin the defendants and we are entitled to charge the same sort of things are going on, before the suit was filed and has continued and is going on right now. That is what we are seeking to enjoin.

Mr. Waller: That is the most astounding thing in any criminal or civil case, that you can go into matters that occur after the bill was filed. Sometimes a supplemental and amended bill can be filed to bring the matters that occurred after the filing of the original bill. That is done in equity cases.

[fol. 1041] The Court: Do you have any authorities on this question?

Mr. Wright: I hadn't prepared any, I had assumed that that question would be raised after the filing of the bill of particulars, that there might have been some sort of motion to strike the Gadsden situation from the bill.

Mr. Waller: We did, in the interrogatories, where they asked for information in the interrogatories about matters happening after the filing of the suit. There are some recent federal cases on that.

The Court: Well, I think there is a distinction between the situation that existed before the filing of the bill, then certain matters relative to that situation that continued after the filing of the bill, a situation that did not exist at the time of the filing of the bill, coming in after the bill was filed.

[fol. 1042] Mr. Wright: Yes, but this is sufficient—we propose to show specifically here what the effect of the conspiracy that is alleged between Crescent and Paramount and between Crescent and Fox and between Crescent and Warner Brothers was on this particular situation. Now, that continued right on through the time that they were operating under the Paramount franchise, for example, which affects this particular situation, which was executed in July 1938 and November, 1937. Similarly, the other franchises were in force at the time the suit was filed and they continued thereafter and we are certainly entitled to show what the effect of these agreements that we claim were illegal between the other companies and the co-conspirators were both before and after the suit was filed.

Mr. Frolich: There can't be any injunctive relief against them.

Mr. Waller: Your Honor, the authorities are—fortunately Tennessee is one of the two states in the Union that still has the distinction between equity and law and we have one of the best books on equity practice in Tennessee, I suppose, that has ever been written, namely, Gibson's Suits in Chancery, with which your Honor is [fol. 1043] thoroughly familiar, of course; that unless an amended and supplemental bill or complaint is filed, everything that transpired or occurred after the original suit is filed—that they are not within the scope of the pleadings. That is a very fundamental proposition and the one that we rely on.

The Court: Ordinarily that would be the rule. In conspiracy cases the rule is somewhat different.

Mr. Wright: I think, your Honor, that would clearly be the rule in a criminal case where you were merely punishing for past offenses but in connection with a suit of

this type where you are attempting to enjoin a continuing violation, I don't think there can be any question but what we are entitled to show the continuance of the conspiracy which we are complaining about right up to the date of the trial. The only possible question would be one of prejudice arising out of surprise or failure to give the defendant proper opportunity to meet that situation. Now, there is no question of that at all because we informed them expressly in the bill of particulars that we were going to put these people on and go into that Gadsden situation.

The Court: Well, it seems like there certainly should be [fol. 1044] some authorities on the subject.

Mr. Waller: We have some authorities but we haven't got them down here.

The Court: Well, they don't do me any good at your office.

Mr. Waller: We have two or three cases where the Government and the plaintiff in the case asked for interrogatories to be answered where the matters occurred after the suit was filed and each case the court held they were outside the scope of the pleadings and didn't have to be answered.

The Court: Well, I think probably the evidence might be admitted for the purpose of showing there was a conspiracy between the defendant exhibitors and the co-conspirators against whom the bill has been dismissed but in view of the fact there is no general conspiracy alleged and no acts alleged to be continuing acts on the part of Columbia, United Artists and Universal such as franchises, etc., I don't see that the evidence would be competent against them.

Mr. Wright: Well, if your Honor please, we allege a continuing conspiracy also against those three. There is no [fol. 1045] difference in the charges. The difference would be in the proof. It is true that we wont be able to offer continuing franchises in the case of Columbia, United Artists and Universal but we have alleged a continuing conspiracy with respect to the other two.

Mr. Raftery: You have alleged nine conspiracies here. The first conspiracy is between the exhibitors, then eight separate ones between each individual exhibitor. As I understand the evidence you have offered, when you offer evidence against the Paramount and Sudekum defendants,

you are not offering that against Columbia or any of the other there.

Mr. Wright: That is right.

Mr. Raftery: Of course, I am not entirely apart from Mr. Wright on whether this should go in or not. We don't want any error in this record any more than your Honor does and just as a suggestion, leave Gadsden alone for the afternoon and give all of us an opportunity to search for law and go ahead on some other evidence.

Mr. Wright: Well, if your Honor please, these people have been here for four days and I don't think that would [fol. 1046] be quite fair to them. Now, if your Honor later decides that any evidence should be stricken, I assume that may be done at any time.

The Court: (To the witness) You can have a seat there just a minute until we can decide this question.

Mr. Dobey: May it please the Court, in the Aluminum case in New York, that case started several years ago and I recall some evidence put in by the Aluminum Company of America near the close of the trial a few months ago or several months ago and it had to do with this new Reynolds aluminum plant which had just begun.

Mr. Wright: I might say, your Honor, that this evidence is sufficiently important to us so that we will make an elaborate effort of proof on it even if your Honor finally decides to exclude it, and I think it would be just as bad if we went ahead and put in the testimony subject to your Honor's later ruling on a motion to strike.

The Court: I don't find it expressly alleged in the bill of complaint filed in this cause that it was a continuing conspiracy. The allegation seems to be upon the past five years. However, no preliminary injunction was issued [fols. 1047-1048] in this case and I assume that the act complained of in all probability is to be followed by the defendants until the methods were declared to be in violation of the Sherman Act.

I think under the circumstances the evidence is competent and I will admit it at this time, subject to the exception, and if you can present me any authorities tomorrow to the contrary, why, I will hear you on them.

[fol. 1049] ROBERT L. CURREY, called as a witness in behalf of the Plaintiff, he having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wright, For the Plaintiff:

Q. State your name and address, please?
A. Robert L. Currey; Gadsden, Alabama.
Q. What is your occupation?
A. I am a moving picture machine operator,
Q. Were you formerly employed as manager at the Dixie Theater?
A. Yes, sir.
Q. In East Gadsden?
A. Yes, sir.
Q. Over what period?
A. July 8, 1940, to September 1, 1940.
Q. By whom were you employed prior to that time?
A. Crescent Amusement Company.
Q. Where?
A. At the Gadsden Theater at Gadsden.
Q. In what capacity?
A. Assistant to Mr. Butler, the Manager.
Q. How long?
A. A year and seven months.

[fol. 1050] Q. Are you familiar with the characteristics of all of the theaters in Gadsden?
A. Yes.
Q. Can you describe the Dixie Theater?
A. The Dixie is a small suburban house, with, I imagine around 500 seats; some seats have been installed since I was there. It was modern with respect to the building, and so forth.
Q. Can you tell us what kind of prices it was operated under when you came there as manager?
A. Yes, sir; the admission was 5 and 10 cents matinee until 5 o'clock; after 5:00 o'clock it was 10 and 20.
Q. Can you describe the Ritz in Alabama City?
A. The Ritz in Alabama City, well I imagine the seating capacity there would run less or equal to the Dixie; it is a somewhat older theater; however, the equipment isn't as new as the Dixie, or the building itself; it is quite an old building.

Q. About how old is it, do you know?

A. No; I would say approximately 15 years old, I guess.

Q. And what sort of prices was it operating under when you were managing the house?

A. Beg pardon?

Q. What sort of prices was it operating under when you were managing the Dixie?

[fol. 1051] A. Well, this is approximate; it is pretty nearly accurate anyhow: it was 5 and 15 cents matinee, 10 and 20 cents at night; and they had a bargain day on Wednesday, I believe of ten cents.

Q. Ten cents day and night. Can you describe the Princess Theater there?

A. The Princess is the largest theater in Gadsden, having I presume, around 1500 seats—1200 anyway; and it is located in down-town Gadsden, and it is the largest theater.

Q. What prices was the Princess operated under while you were managing the Dixie?

A. The Princess' admission prices were 10 and 25 cents, any seats, until six o'clock; after six o'clock it was 10, 25 and 30.

Q. Can you describe the Gadsden Theater?

A. The Gadsden Theater is on the edge of the business district of Gadsden; it is an old opera house type theater, I imagine about thirty years old, has a seating capacity—when I worked there, had a seating capacity of 817.

Q. And what sort of prices had this theater while you were managing it?

A. That was a combination vaudeville and picture house, running vaudeville every day except Sunday. Admission prices then were 5 and 10 cents matinee, 10, 15 and 20 cents [fol. 1052] at night; and the bargain day was on Wednesday, and Thursday 10 cents all day.

Q. Can you describe the Princess?

The Court: He has already described that.

A. I think I have already described that.

Mr. Wright:

Q. The Princess was the first run house. The Capitol? I beg your pardon.

A. The Capitol compares in size, I imagine, compares in size between the Gadsden Theater and the Ritz Theater. It is a very small theater.

Q. And how old is it?

A. I don't know; I couldn't say; it is about 15, I imagine, 15 years old.

Q. What sort of condition is it in?

A. Well, it is hard to say; it is just about what you would call, I guess, a second-class theater.

Q. How does it compare with the Dixie in East Gadsden?

A. Well, the Dixie is more modern in every respect than all of the theaters except the Princess.

Q. And what prices was the Capitol operating under while you were managing the Dixie?

A. They were 10 and 20 cents all the time except on Thursday; on Thursday they had a bargain day—ten cents straight.

[fol. 1053] Q. You say you became manager of the Dixie on July 8, 1940?

A. Yes, sir.

Q. What sort of pictures was the Dixie playing then?

A. They were playing third and fourth run pictures, with some re-issues.

Q. Well, did you attempt to get some better pictures for the Dixie?

Objection by defendants, Sustained.

Q. What efforts did you make to license films for the Dixie?

A. Mr. Butler, the first time I discussed the situation with him about getting some more current films to run, he wasn't able to offer any information on the subject at that time; he said at that time they were negotiating with the first run houses; that is, the Crescent Amusement Company, for, I think, a five-year contract, and he didn't know just how the situation was at that time; he couldn't give me any definite information on that.

Q. What season's Metro product were you talking about?

A. 1939-1940 product.

Q. Had any of those been run in Gadsden at the time you are talking about?

A. No, sir; that product hadn't been run.

[fol. 1054] Q. The season had about a month to run then?

A. Yes, sir.

Q. Then did you have any further conversation with Mr. Butler or any one in Atlanta, about getting Metro pictures?

A. Not at that particular time. I went over to Atlanta a few days later and got in touch with the branch manager, and he came and talked the situation over with me, and he told me more or less about what Mr. Butler did, that they were negotiating for a five-year contract with Crescent Amusement Company and he didn't know when this product would be available, but, that when they did get that contract approved they could start serving me regularly subject to clearances, etc.

Q. Did he offer you any films at all?

A. Yes, he offered me four or five re-issues, which I bought at that time.

Q. How old were they?

A. Four to six years old.

Q. Did he offer you anything else?

A. No.

Q. I will show you some correspondence here: A letter dated July 15, 1940, from you to the Metro office at Atlanta [fol. 1055] and their reply of July 18th. Another letter from you, dated July 19, to the office manager there, and his reply to that letter of July 26th. Will you tell me whether those letters were either written or received by you on the dates stated there?

A. Yes, this is; the first letter I wrote him was just a short while after I visited Atlanta. He said at the time I was over there he would let me know just as soon as he could because I had preference to Sunday showing pictures, and I didn't get any current to run on those days; and he said he would let me know within a short while yes or no; and so this is a letter I wrote him, because I was really hard up. I indicated a definite answer—

Q. You are referring to the letter of July 15, 1940, which has been marked Exhibit 83, for identification?

A. Yes; this is the letter that I received from Mr. Avey in reply to that letter of July 15th.

Q. This letter of July 18th?

A. Yes. And this is a second letter that I wrote him, a letter dated July 19th, and this was his answer to that.

Q. That is a letter dated July 22nd.

A. Yes.

Q. I will offer these four letters in evidence. If there is no objection, I will read this, the first letter, from Robert

[fol. 1056] L. Curry to the branch office at Atlanta (Reading):

"Dear Sir:

Not that we are trying to rush you to a decision, but have you any information to offer regarding the availability of your 1940 product for our use in the Dixie Theatre?

When I was in Atlanta the other day, I explained that we were badly in need of some new product to run on our Sunday, Monday and Tuesday programs. The situation is really more acute than even I realized. Since we are the only ones running your product in Gadsden this year, it should not seem odd to anyone that we think we are entitled to such product as you have released on your 1940 program.

We are well aware of the fact that you must cater to whichever exhibitor will or can use the greater volume of your product, and we can readily appreciate your position, but don't you think that if nothing is agreed upon between you and our competitors in the very near future that the year will have been almost expired and that you will have gone through an entire year of releasing without having collected any revenue from your 1940 product in this city?

[fol. 1057] Too, I am almost sure that Mr. Sudekum has waited long enough that even if he should buy your product he would not want that product which is practically second run in this trade area. I KNOW: I worked for him nearly two years and I KNOW that he is much too shrewd a business man to do otherwise.

We are not in business to put our competition out of the theatre business, but only to make a living. We believe that there is quite enough product on the film market to supply them and us too.

The writer appreciates your personal attitude in this matter and I could be nothing less than very complimentary toward your very fine salesman, Mr. Butler, but I cannot be so foolish as to agree with anyone to the fact that this situation is at all fair to us or to you. I do not ask you to try to sympathize with us as I'm sure you already do. All I ask you to do is to tell us something definite about this thing at least by the first of August. Whether we are favored with the release

of your 1940 product for our use or not, a definite statement from you will set our minds at ease and we can act accordingly.

We would like to again request that you let us spot [fol. 1058] a few of your late product or contract for some pictures with the special waiving clause which I explained to you. At any rate please let us hear from you at your very nearest convenience.

Hoping that you will give us your very kind assistance in this matter and that you WILL find it very plausible to release to us some 1940 product;

We remain

Yours very truly, Dixie Theatre, Robert L. Curry."

[fol. 1059] Mr. Wright: What was the special waiving clause?

A. I told Mr. Avey if he would go ahead and let us buy some of these pictures under that signed contract, and they would want those pictures, we would automatically relinquish our first run contract.

Q. What did he say to that proposition?

A. Said he couldn't do it.

Mr. Wright.. The next letter from Mr. Avey to Mr. Curry, dated July 18, 1940, is as follows:

"Replying to your letter of July 15 regarding our product for first run in Gadsden, Ala., the writer informed you when you visited our office last week that we were negotiating with our regular established account in Gadsden for the placing of our product in that town, first run. I thought I made our position in this matter clear to you, as you went so far as to go over our records and you selected some pictures from a list of many that were available for use second run. Therefore, I am at a loss to understand why you wrote us your letter of July 16. Sincerely, Loew's."

Q. What was your list available for use second run?

A. There were about six reissues and I bought four of them.

[fol. 1060] Q. Were there any others that were not reissues that were on the list?

A. No, sir.

Q. The pictures were during the 1938-1939 season, were 1938-1939 product?

A. Most of them had been played too.

Mr. Wright. Mr. Curry's letter to Mr. Avey, manager of the Loew's Branch, Atlanta, Georgia.

"According to your letter of July 18, you evidently mis-understood the purpose of mine of July 15. I did not ask for a first run contract in Gadsden on Metro product, but merely was trying to get some definite statement from you as to the possibility or impossibility, as the case may be, of your running any 1940 product from you in the near future.

"I thought if I could get a definite statement from you, whether it be pro or con, I could prepare to cope with either situation resultant of your definite statement. You see, I am not nearly as interested in running your product *first* run as I am in merely running your *newer* product—whether it be first or second run in Gadsden. In fact, I wish that the Princess in Gads- [fol. 1061] den was running your '40 product first run now so that I may have the opportunity to get some Metro pictures which are not in the old group.

"What I really want to know is this: will I be able to get *any* 1940 Metro pictures for use in the Dixie theater either first or second run by August first, or can you give me any definite statement by that date regarding same? If I can get these pictures I will be no less than delighted. If I can not get them I will not be so happy, but I can seek another product for our use that will not be quite as old as the product we are now playing from your exchange.

I do not regret having bought the pictures I am now being served from you as they are good pictures for my week-days, but as I explained to you, I have not even one contract at the present time from which I may select to run on my Sunday-Monday-Tuesday programs. None of the pictures from you or others are suitable for these days. You can see now why I am so terribly anxious to get a definite answer from the question, "Will I be able to get your newer product either first OR second run anytime in the near future?" It is very unpleasant for me to be held in such terrific

[fol. 1062] suspense for a very long period. I *want* new Metro product for my house if it is ever available. That is why I have not even considered taking the matter up with another exchange. I am sure that there are others from whom I can get new second run product, and I very likely shall buy such product from them, but I would like very much to have some new Metro product for my Sunday-Monday-Tuesday programs.

"Perhaps I am going to too great a length to try to explain the purpose of my letter of July 16, but I want to feel sure that you understand it and accept it in the proper light. In fact, I think that the trouble with you and me is that we really do not quite understand each other.

"I am holding all my Sunday-Monday-Tuesday playdates open past August 4th in view that something may become final from you by August first. That is why I requested a definite statement from you by August first.

"Hoping that thi*d* clears up the purpose of my letter of July 15 and that you will enjoy the privilege of doing a great amount of business with you in the very near future, I remain, Very sincerely yours."

The next letter is July 26, 1940, to Mr. Curry, from Mr. Avey.

[fol. 1063] "Replying to your letter of July 19th, with further reference to our product for your theatre,—

"There is nothing I can add to what I told you when you visited with me in my office two weeks ago and also what I told you in my letter to you of July 18th, and that is that we are negotiating with your established account in Gadsden, Alabama, and certainly under the circumstances we would not think of selling our product to your theater located in the suburban mill section of Gadsden and forego prior runs that we should have in Gadsden.

"We will do everything we can to continue to find product available for your use and you know that we have many pictures that you can use, and why you continue to try to push us to give you an answer regarding our new product we can not understand.

Yours very truly."

Q. By the way, is the Dixie in the suburban mill section in Gadsden?

A. Yes, sir.

Q. And the Ritz at Alabama City is also in the Suburban section of Gadsden?

A. Yes, sir.

Q. Then after that final letter of the 26th, did you have any more conversation with him, or with any salesman?

[fol. 1064] Q. No, sir, I did not have any more conversation with any salesman.

Q. Did you go in to Atlanta?

A. I went into Atlanta the week after I got that final answer, that was final, it was what I was trying to find out, so I went into Loew's exchange and dated all that old product that had been given out, and I haven't been back in the exchange centers.

Q. Did you see the picture exchanges?

A. Yes.

Q. Did you go to other picture exchanges?

A. Yes, sir, went to Twentieth Century Fox.

Q. Who did you talk with?

A. I talked to Mr. Crocy, and he assured me that they would look after me, turned me over to Mr. Mitchell, Mr. Mitchell was a salesman, and I sent Mr. Mitchell word to come by and see — at his convenience, which he did.

Q. When was that?

A. Oh that was about a week and a half or two weeks after I sent him word to come to see me.

Q. What was the conversation you had with him?

A. I asked Mr. Mitchell, if it were possible for us to get any current releases, second run or what could we get from him in current releases, and he got with me on a contract there whereby we would run 1939-1940 Fox pictures.

[fol. 1065] The Court: Second run?

A. Subsequent run.

Mr Wright:

Q. That was after the season that was just ending?

A. Yes, sir, that was the season that was just ending.

Q. And is this contract marked for identification, Government's exhibit F-6 for identification, dated August 1, 1940, the contract you made with him?

A. That is it.

The Court: What technical difference is there between second run and subsequent run?

Subsequent run include the third run?

A. Subsequent run, your Honor, is after first and second run.

Mr. Wright:

Q. The reference in here, Mr. Curry, to the statement in this letter, with *RH*spect to clearance and run, first run in East Gadsden, second run Gadsden, Alabama City, did you have any discussion about the clearance at the time you negotiated the contract?

A. Yes, sir, I did. Mr. Mitchell and I discussed Alabama City as a part of Gadsden, a suburb of Gadsden, a suburban theater, and that city or that town, the Alabama City theater, Alabama City has first run, and that [fol. 1066] Alabama City was not considered by them to be even a part of Gadsden, so I argued the subject with him, and he gave me what he called the subsequent run contract, and then I said, why can't I run first run pictures in East Gadsden, what is the difference, and he said I will put it in the contract so far as I was concerned I was just playing those pictures, but he was just pulling my leg. First run in East Gadsden had no meaning, inasmuch as there were no other theaters in East Gadsden.

Q. There wer- no other theaters in East Gadsden anyway, is that right?

A. That is right.

Q. What was said at that time if anything with reference to the current pictures, 1940-1941?

A. Mr. Mitchell told me that if I would go ahead and use any of the product that was available immediately, that it would be an open run, on that product.

Q. By that product, you are referring to the 1939-1940 product?

A. Yes. He sa-d that if I would do that in a hurry and go to playing as soon as possible, he would give me a nice set-up on the 1940-1941 product.

Q. How were those pictures that were played under this Fox contract made available to you, with reference to the date they were played in the other Gadsden houses?

A. There was no clearance in there because as I ex- [fol. 1067] plained before, most of the product had already played Gadsden.

The Court: It had already been played before you made your contract?

A. Yes, sir.

Mr. Wright:

Q. Who else did you have any negotiations with?

A. I didn't negotiate any other contracts.

Q. Did you try to get any other major product?

A. No.

Q. Try to negotiate with Paramount?

A. No, I didn't feel like I could get anything from Paramount because it was well understood that the Crescent Amusement Company had a first run franchise an- second run option, so I didn't even have the heart to go to see them.

Q. He had a second run option?

A. Yes. My position was that Alabama City has first run clearance and before I could get any picture like that and it would be fourth run, and most Paramount pictures I would not consider of enough value to run on fourth run.

Q. That is Paramount pictures were played in Alabama City, in this order, at the Princess in Gadsden, then the Ritz in Alabama City and then the Capitol in Gadsden, before you got them?

A. That is right.

[fol. 1068] Mr. Waller: You mean in that order, Mr. Wright? The lawyer is testifying, and I am not sure.

The Court: I understood the witness to say that first and second runs went to Gadsden and Alabama City, then back to Gadsden for third run and he got the fourth runs.

Mr. Wright: You may cross-examine.

Mr. Waller: Your Honor, this is a little bit out of the ordinary, and before we go ahead, may we have a short recess to confer about this matter?

(Recess.)

[fol. 1069] Cross-examination.

By Mr. Waller, for Defendants:

Q. Mr. Curry, as I understand it, this Dixie Theatre is what is known as a suburban or neighborhood theatre, is that correct?

A. Yes sir.

Q. And was built for the purpose of taking care of the people of East Gadsden, who had no theatre?

A. I don't know anything about that, I don't know why it was built.

Q. At the time it was built, there were three theatres inside of Gadsden, proper, and one theatre in Alabama City, operated by the Crescent Amusement Company.

A. Yes sir.

Q. There has been no theatre started by the Crescent Amusement Company since this Dixie Theatre was built in East Gadsden?

A. No.

Q. The patronage of the East Gadsden Theatre comes from the people of that community?

A. The majority of it does, yes.

Q. And the policy of a suburban or community house, neighborhood house of that kind, is to play first class pictures but to play them subsequently to the playing of those [fol. 1070] same pictures in the down-town sections?

A. Do you want m- to affirm that? I don't know.

Q. The down-town theatres, other than the Princess, played B pictures, sensational pictures, outside pictures?

A. Most of the time.

Q. The Princess Theatre played these high class, first class films?

A. Yes.

Q. And as Manager of the Dixie Theatre, what you wanted to do was to play the same type of films that they were playing, and, of course, play them after the Princess Theatre played them?

A. Yes.

Q. In other words, you didn't want to play this sensational type of pictures that were played in the B houses in the down town section?

A. Right.

Q. The patronage of those down-town theatres is, to a certain extent, transient trade, is it not?

A. The down town theatres?

Q. Yes?

A. No.

Q. The down town theatres in any community cater to transient trade, as well as local trade?

A. As well as local trade, yes.

[fol. 1071] Q. And for that reason, they have to play pictures pretty currently, play them soon after they are released?

A. Yes.

Q. Whereas, in the neighborhood or suburban house, the idea of the management is—Take your house, because that is the only one you know about, is to play better pictures late rather than to play B pictures early?

A. I wouldn't say that, no. My idea was to get good and later pictures than what they were running when I went over there.

Q. What was it about my question that you didn't agree to?

A. I didn't know anything about playing B grade pictures. All I wanted was good pictures. We were running good pictures but they were too old.

Q. I say, you would rather play a good picture late than play a bad picture early?

A. Yes, yes.

Q. Your complaint was that you wanted to play these good pictures sooner than you were playing them?

A. Yes.

Q. When you became manager of the theatre, you were able to get a subsequent run product from the major producers, except Metro, were you?

A. Yes.

Q. And you wanted to get the 1939-1940 Metro product, [fol. 1072] which had not been shown in the Princess Theatre?

A. Yes.

Q. The Princess Theatre is a theatre which has a larger seating capacity than the Dixie Theatre and charges higher admission prices?

A. Yes sir.

Q. So, of course, the film rentals for those pictures in the Princess Theatre are considerable more than in your Theatre?

A. I presume so.

Q. You don't think you could afford to pay the same prices as the Princess Theatre paid?

A. No, I don't entertain any such idea.

Q. And when you took the matter up with Loew's or Metro, you were informed that they were negotiating for the sale of these pictures which had not been run?

A. Yes.

Q. Have you kept up with the showing of pictures in the town since that time, as to whether they have Metro pictures, or a substantial part of them, being shown in the Princess Theatre?

A. No, because I haven't been interested in any theatre since that time.

Q. You spoke about——

The Court: You left there in September, 1940?

A. Yes sir, September 1st.

[fol. 1073] Mr. Waller:

Q. You spoke about this theater in Alabama City, that is in a community on the other side of town, somewhat similar to that community in East Gadsden, did you say?

A. Yes.

Q. And that theatre was there and had been operating for some time before the theatre in East Gadsden was built?

A. Yes.

Q. The people of East Gadsden didn't want to patronize that theatre, they wanted one of their own?

A. I don't know, I don't know anything about that.

Q. Alabama City was a separate corporation until a short while back, was it not, I mean, a separate municipality, it was recently taken into the city of Gadsden?

A. It was taken in within the past ten years.

Q. Wasn't it considerably less tiie than ten years ago?

A. It has been right nearly ten years.

Redirect examination.

By Mr. Wright:

Q. You have referred to the East Gadsden being in the city of Gadsden, and a part of Alabama City being outside. Since Alabama City was taken in, there has been no difference between the two communities insofar as their relation to the city of Gadsden is concerned?

A. No, they are both under the same city government.

(Further this deponent saith not)

[fol. 1074] H. T. BAILEY, Called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you tell us your name and address, please?
A. H. T. Bailey, East Gadsden, Alabama.
Q. What is your occupation?
A. I am a theatre manager.
Q. Of what theatre?
A. The Dixie Theatre in East Gadsden, Alabama.
Q. How long have you managed it?
A. Ever since September 19, 1940.
Q. After you became the Manager, did you write the Loew's Company to obtain some of their pictures to show there?
A. Yes, immediately after I became Manager, I wrote Mr. Avey, Branch Manager Loew's, a letter with regard to obtaining the product for the Dixie Theatre.
Q. Is this the letter, dated September 20, 1940—is that a carbon copy of the letter you wrote? Exhibit No. 87?
A. Yes that is the letter.
Q. Did you again write them on October 2, 1940?
A. Yes sir, I wrote them on October 2, 1940 also.
Q. This letter is marked Government Exhibit No. 89, is [fol. 1075] that a copy of the letter you wrote?
A. Yes.
Q. The letter of September 20, 1940, Government's Exhibit No. 87, addressed to Loew's, Atlanta, is as follows: (Reading)

"Gentlemen: I have on this date been appointed as Manager of the Dixie Theatre in East Gadsden, Ala. I am in full authority and have the right to make any decisions, contracts, or bookings which I may see fit to make for the good interest of this theatre.

In checking over old correspondence, I find that, in the past, this theatre has faithfully run 100% MGM product, and has carried out all its contract obligations to the last letter. As the bookings now stand, all product originally bought from you is now dated, the majority of same having been played and paid for.

We are running short of newer product, which our Sunday-Monday dates demand. We need new MGM

product, and that is the reason for this letter. According to all records we now carry, and, according to all I can learn, the 1939-40 product has neither been run, or contracted for in this locality. I am not asking for a first-run contract, but for an arrangement whereby we could run this product second run to the Princess Theatre, here.

[fol. 1076] "According to the fair trade practice code, which I understand all distributors follow, if one concern does not accept or reject product made available to them within a certain length of time, the very fact that they did not render a prompt answer to the av-il-ability notice constitutes a rejection of the product, automatically making same available to any other concern who might desire it. It seems to me that this is the situation existing here, and we should have a chance at this product, since Mr. Sudekum does not seem to want this product. After all, does it seem fair to give a small, struggling theatre old product, for this theatre to run all this old stuff, and then, after they have faithfully fulfilled their contract, to be denied decent product, simply because a chain cannot make up its mind what it want- to do?

We are asking you to look at this matter from a fair and unbiased standpoint, and to see what you can work out.

We would accept a contract whereby we could start on the product, and, if at any time Sudekum decided to take the product, our contract would automatically become a second-run arrangement, and the Princess [fol. 1077] would have priority and clearance over us.

I honestly believe, that if you consider this application, you can work out some arrangement with us to our, as well as your mutual advantage.

I am planning to get over to Atlanta shortly and try to work out something with you, provided you cannot arrange something immediately. Let's get together on this thing, and go to town. We frankly need your product, and I feel sure that you could put our little rental money to some good use. What about it?

Trusting that this will fall under favorable eyes, and anticipating an early yes, or no reply, I remain,

Yours very truly * * *"

Q. Did you get any reply to that letter?
A. I received no reply to that letter.
Q. This letter is written on October 2, 1940, from Dixie to Loew, and is as follows: (Reading)

"Gentlemen: Previously to this date I have written you two letters with regard to obtaining MGM product second run, for the season of 39-40. In these letters, I have made only reasonable requests, and have reiterated my willingness to comply to any of your wishes [fol. 1078] with regard to any *of your wishes with regard to any* possible future arrangement you might see fit to affect, in order that you could properly service the Princess Theatre in Gadsden. You stated in a former letter in reference to this same matter, that this Theatre was located in a "small Mill Section" of Gadsden. We would like to inform you that the Dixie Theatre is well located in the best section of East Gadsden, where is located the Goodyear Tire and Rubber Plant. The residential section is prosperous, and over 5000 persons, potential patrons reside in this section. In addition, the Government is closing plans to build a $25,000.00 shell and munitions plant in this section, not three miles from the Theatre. This will give us a vast drawing field, without interfering with Crescent territory at all. MGM new product played here will make money for you, as well as ourselves.

"The Ritz Theatre, a Sudekum property, in Alabama City, Ala., has "First Run"--Alabama City" contracts. We maintain that this theatre is located in as well populated and richer community, has its own Post Office and business houses, and boasts as good, or better status than Ala. City. It is with these circumstances in mind that we again request that you [fol. 1079] give us these pictures with no Theatre having clearance over us except the before mentioned Princess Gadsden. This is a fair and square business proposition and should not be held up because someone else can not, or will not make up his mind.

Please grant us the courtesy of an early answer.

Thanking you, we remain, Yours very truly * * *"

[fol. 1080] Q. Did you get an answer to that letter?
A. I received no answer to that letter either.

Q. Then did you go into Atlanta?

A. Shortly after I wrote that letter I went into Atlanta, made a trip into Atlanta.

Q. Who did you see there?

A. My main object in going into Atlanta was to try to work out some kind of deal whereby we could get the newer product of Metro as well as some of the other distributors over there. When I got in Atlanta I found that Mr. Avey, the manager, was on a trip, I don't know exactly where, but he was out of town and would be out of town for some-time to come. I talked to the booker, Mr. Beavers, who was our booker in the office and asked him if there was any product I could date or if there was any arrangement that I could make whereby we could get a little bit better product because we were really getting in need because our Sunday and Monday dates were almost without pictures. He told me that with the authority that he had it was impossible for him to let us have any further pictures and that as I already had all the pictures which were contracted for at that time dated, there was absolutely nothing he could let us have.

Q. Then did Mr. Butler come to see you later?

A. Shortly after that, which was in December, I believe, Mr. Butler, representative of Metro, called on us at the [fol. 1081] theatre and he told me that at that time he was ready to make us a deal for the 1940-1941 Metro product.

Q. Did he say anything about 1939-40 pictures?

A. He said that he didn't know the situation on the 1939-40 pictures well enough, that is, that there had not been a satisfactory arrangement worked out yet with the Crescent Amusement Company but as soon as such arrangement was made he would come back and make an arrangement for us to get the 1939-40 product.

Q. I show you this contract dated, acceptance date December 13, 1940, and application date November 28, 1940, between the Dixie and Loew's for the exhibition of the 1940-1941 product, marked Government's Exhibit No. L-10, for identification and ask you if this is the contract that you made?

A. Yes sir, that is the contract for the 1940-1941 product.

Q. I call your attention to the November 28th, 1940 date. Does that refresh your recollection as to when you made the contract?

A. Well, yes. I couldn't make a definite statement as to the exact date but this is the contract, this is the application for contract that he drew up.

Q. It was on or about November 28th?

A. That is correct.

Q. Now, had any of the 1939-1940 Loew's pictures then been played in Gadsden?

[fol. 1082] A. At that time to my knowledge none of the 1939-1940 had been played although some of the 1940-1941 were beginning to play at the Princess.

Q. I call your attention to the language of this contract following the word "Rental", "and subsequent follow Ritz Theatre Alabama City section of this town not earlier than sixty days after first run Gadsden, Alabama."

Did you have any conversation with Mr. Butler about that?

A. Yes sir, we had a conversation regarding that clause. I pointed out to him the fact that the Dixie Theatre was as well situated, was as good a theatre and had as many advantages as the Ritz Theatre in Alabama City, and for that reason I saw no reason why Alabama City Theatre should be held over us.

Mr. Raftery: Now, we are in the period of the consent decree. Metro is a party to the consent decree. All clearance questions may be arbitrated under the terms of that decree. If this man thinks that the clearance is too long he can go and get that straightened out.

Mr. Wright: Mr. Raftery is entirely in error because this contract happened to state clearance "none". It is so set out that this man and this theatre had no chance of obtaining any relief whatsoever in any clearance proceed-[fol. 1083] ings under the decree. That was one of the things that we expect to show, that this deal was deliberately set in such way that he has no opportunity to obtain relief against the situation that confronts him, that is, the Ritz being given clearance over him.

The Court: Why is it incumbent upon the Court in this case to construe that consent decree?

Mr. Wright: I don't think it is at all. Mr. Raftery made the suggestion. He happens to be wrong about it. I don't think your Honor needs to construe it.

Mr. Raftery: As a matter of fact, I am not wrong. You have read a provision here a minute ago that the man

played sixty days—would you be good enough to read that?

Mr. Wright: The run provision is: "Subsequent follow Ritz Theatre Alabama City section of Gadsden—not earlier than sixty days after first run Gadsden, Alabama. Clearance none."

Mr. Raftery: Sixty days, very definite. That provision is very clear. Whether it is marked "Clearance" or not, the arbitrator is going to look at it.

[fol. 1084] The Court: I think that "clearance none" means he doesn't have clearance over any theatre.

Mr. Raftery: That is right.

By Mr. Wright:

Q. Now, can you tell us, Mr. Bailey, just how pictures were made available to the Dixie Theatre under this contract?

A. They were made available to us approximately sixty days after they had made their downtown run but——

Q. That was the run at the Princess you refer to?

A. Yes sir, but between times that the picture was running at the Princess Theatre and our availability date the picture was run at the Ritz Theatre in Alabama City and it usually followed the Princess Theatre, the run at the Ritz Theatre of Alabama City usually followed the run at the Princess Theatre by from fourteen days to three weeks, which made us run from thirty days to, around forty five days behind the run at the Ritz Theatre in Alabama City.

The Court: That is the trouble with letting in or allowing evidence in this case on matters that have arisen since the original bill was filed. I can't see where anything that has happened since the entry of that consent decree is competent in this suit.

[fol. 1085] Mr. Wright: I don't understand that, your Honor. If it is something that the consent decree doesn't—

The Court: You have settled the complaint against these five big producers.

Mr. Wright: No, we didn't.

The Court: You have entered a consent decree dismissing this suit as to them. Now, anything that has happened under this consent decree will have to be taken up in the court at New York where the consent decree was entered. What has this court to do with that?

Mr. Wright: If your Honor please, this doesn't happen to be a situation where there is any relief available under the consent decree.

The Court: If the Government couldn't stipulate sufficiently to protect themselves and make a consent decree, that is their fault.

Mr. Wright: If your Honor please, there was not any understanding; in fact, the understanding was expressly made at the time the consent decree was entered that this [fol. 1086] suit in the other circuits would proceed to trial with the defendants who consented to that decree left in those cases as co-conspirators with the defendant exhibitors. All that we agreed to do at the time we entered the consent decree was with respect to them and all that we did do was to dismiss the charge that they had conspired with each other and to dismiss them as defendants in this proceeding. Now, it was explicitly understood that they were to remain charged in all of these circuit cases as co-conspirators with the defendant exhibitors in those cases. The consent decree, of course, was not able to touch the problem or give any relief against the exhibitor defendants that are parties to this suit because none of them, of course, were a party to the New York suit at all, and the mere fact that a decree was entered to which they consented had nothing to do with the question of whether or not the Crescent and the other defendant exhibitors in this case combined and agreed with Loew's or anybody else who signed that decree to monopolize the exhibition of pictures in the Crescent towns.

Mr. Raftery: Judge, here is a contract that is made after the entry of the consent decree by Metro, a party to the decree, and the exhibitor and this exhibitor is complaining [fol. 1087] that he has to follow the Ritz Theatre in East Alabama, or whatever the name of the town is, and he plays sixty days after first run.

The Court: Well, that is what I said.

Mr. Raftery: Clearly a clearance proposition.

The Court: This exhibitor is not a party to this suit and if he has any complaint against any of these distributors pertinent to any of their acts that have taken place since the entry of that consent decree it looks to me like that is a matter for the District Court in New York.

Mr. Wright: Well, if your Honor please, that consent decree is not all-embracing and it is not an adjudication in any sense of the word.

The Court: I left my copy at home. Do you have another copy there of that consent decree?

Mr. Wright: That decree doesn't, of course, undertake to declare anything illegal or legal. It merely represents an agreement on the part of——

[fol. 1088] The Court: It is a settlement of the lawsuit. That is what it is.

Mr. Wright: It is a settlement of the lawsuit in which the parties made an agreement to, among other things, to arbitrate certain types of disputes which might arise.

Mr. Frolich: All over the United States.

The Court: Under Section 8 it says "Controversies arising on the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable are subject to arbitration under the following provision", and there is a note there that says that clearance means a period fixed by agreement between a distributor and an exhibitor prior to the expiration of which a theatre licenses for a prior situation, the theatre may not be subjected to any other theatre or theatres.

Mr. Waller: Suppose your Honor were to take jurisdiction of this matter and find there was something wrong being done, the only thing your Honor could do would be to enjoin the Crescent Amusement Company from playing [fol. 1089] pictures before this man played them. Now, how could that injunction become effective? You couldn't enjoin Metro from giving them to us sooner. We have got to take them when Metro gives them to us. You would have to enjoin us in a negative sort of way from giving them to us before the other people played them. It just couldn't be done.

Mr. Wright: If your Honor please, your Honor suggested—if we are going to go into the question of how that decree is to be construed and what it means, we are in a very complex field and quite far from this lawsuit. Now, the Appeals Board, which is set up under that decree has just handed down a decision a few days ago or rather about a month ago, in which they held that where you state a prior claim position in terms of run, as it is stated here, then there wasn't any arbitration under Section 8 because there

was no clearance involved and it was only a question of run; that you couldn't arbitrate run under Section 8, and that is why I say the evidence in this suit or Section 8 of that decree doesn't touch it.

By the Court:

What is the difference between clearance and run?

Mr. Wright: Well, a distributor will tell you that clear-
[fol. 1090] ance is something that is merely an interval of time that lapses, as stated in the contract, that if it don't state in the contract that B is to follow A by thirty days but if it merely states in the contract that A is to have first run in one location and then they sell another run to B in another location, that the mere fact that they may actually work B behind A thirty days, it doesn't mean clearance. They are just selling different runs and they can, of course, sell any run for playing at any time without any let or hindrance from that decree.

Mr. Raftery: If what Mr. Wright says is true about the Appeals Board, it is a sorry commentary on the appeal statute that has been set up indeed.

Mr. Wright: It is indeed.

Mr. Raftery: That is the main reason we didn't go into it. However, a run, your Honor, you let a man run, say first run, the time that elapses between that showing and the next showing in the same competitive area is the clearance period. Now, as I understand arbitration in the ordinary sense, they cut through or try to cut through legal entities and go to the justice and right of a situation. Here is a contract, which, in effect, says that this man's avail-
[fol. 1091] ability is sixty days after the downtown run, which means the Princess Theatre.

[fol. 1092] The Court: Well, that looks to me like a down-town theater would have a sixty days' clearance one over the other.

Mr. Raftery: A sixty day clearance one over the other.

Mr. Wright: That is not what he complains of at all.

Mr. Raftery: He says the same interest that owns the down-town theater owns another theater on the other end of the town, and he puts another run in the middle, so he plays not sixty days after Princess but 60 days after Ritz and Princess. Now, the arbitrafors will look at the situation and will adjust it if it is right or justice demands it be

adjusted. Now we say this decree is entered in November, just after the first Thanksgiving last year; the contract with the government is taken on the 28th of November; the proof in December; right immediately after the decree; I say that this is the proposition; that if East Gadsden is right, but——

The Court: Well, it would seem the decree is a settlement [fol. 1093] of all matters and claims that the Government had against these producers at that time.

Mr. Wright: Well, I don't think that that just is correct, your Honor.

The Court: On the complaint set out in that suit.

Mr. Wright: At the time the decree was entered, it was expressly understood that they would remain in these cases.

The Court: Is there anything said about that in the decree?

Mr. Waller: Not a word, your Honor.

Mr. Wright: Well, that decree does not pretend to deal with this litigation.

The Court: I think it covers other actions in the United States and expressly says only the United States and not foreign countries.

[fol. 1094] Mr. Wright: That is true, your Honor, but the mere fact that they signed a consent decree, that doesn't mean—that decree does not say anything about conspiracy.

The Court: Well, it is just forgiving them of all violations of the law, is that it?

Mr. Wright: That decree does not forgive them of conspiracy with anybody. But I think we are getting far afield.

The Court: I think so too.

Mr. Wright: And we are entitled to show whether Mr. Waller is correct, that all you could do would be to issue an injunction, and if Mr. Raftery is correct, there would be relief under the decree. In either case, we are entitled to show in this case law violations arising out of conspiracies between these distributors and defendant exhibitors; that is certainly a proper part of our case; and if they do discriminate against this exhibitor in this town; that is, if all the defendant exhibitors act together and agree to discriminate [fol. 1095] against him in serving their pictures, there was a clear law violation; and this is what we propose to show in this suit, when we get to that type of violation. When we get to what relief is to be granted will be plenty of time to

consider a consent decree, but I don't see how that enters in the case at all at the proof stage.

Mr. Raftery: By the way, your Honor, there is one other point I forgot to mention: That consent decree was not entered on the original bill of complaint filed by the Government. In the original bill of complaint the attack was only against the Big Five. On the morning of the offering of the consent decree, a motion was made by the Government, returnable on the same morning that they presented the decree, asking leave to file a supplemental bill of complaint. In the supplemental bill of complaint they alleged that the Big Five had conspired with so-called independent circuits —meaning circuits like the Sudekum circuit—in these preferences and priorities and all these catchwords that were invented when the original one was filed. Then the Big [fol. 1096] Five came in and filed five answers to this new and supplemental bill, and then a decree is presented so as to take care of that situation; that specifically brought in all these cases like the Schine case, the Griffith case and this case into that case, and then entered the relief. Now, when you get down to the relief part, what remedies do the exhibitors have, and what remedy does the Government have. So, the only remedy of any exhibitor in the country is to file a complaint in arbitration against the consenting five. The only time a commitment proceeding can ever be filed is when some member of the Big Five fails to obey the ruling of the arbitration board. So then they have amended the complaint against us in New York, with the permission of Judge Goddard, and that case is to be tried some time in the future, but the independent circuits were brought in for the first time in that case when the decree was presented.

The Court: Mr. Wright says this evidence is offered not for the purpose of obtaining relief against the distributors, but for the purpose of obtaining relief against the exhibitors who are not a party to this consent decree. Do I state it [fol. 1097] correctly?

Mr. Wright: Yes, your Honor.

Mr. Raftery: Well, if that is the case, if they feel there is anything wrong, if there is any force in that argument at all, they could have kept the Big Five in this suit.

Mr. Wright: That decree does not legalize anything.

Mr. Raftery: I agree with you in that.

[fol. 1098] The Court: Would you mind telling me, Mr.

Raferty, what is the objection of your client to United Artists in signing this decree?

Mr. Raferty: I can't tell you that in less than three hours. In the first place we took the position we had not violated the law in any respect and should not have been in that lawsuit. That lawsuit was directed primarily at those Companies, and they directed this litigation originally against the five of them. As Mr. Williams said that was not in issue in the litigation, and he explained it in the opening before Judge Goddard. We object to it first as fundamental, we thought it was an attempt to prove the connection with them, an attempt on the part of the Government materially to interfere with private business, and consequently we were opposed to goinf into any arbitration efforts, we could not afford to, it was an expensive proposition, and in the second place; and the third place we wanted to reserve to ourselves the right to sell our own customer, select our own customers and deal with them or not deal with them, and the result was that we had to do that because of this matter of [fol. 1099] selling, as we did not have a flock of theaters to take care of our products, we know there is an impression of that kind, when they have to sell them in blocks of five, for instance there is the Paramount, it has theaters af-iliated with it, and you can sell or not, but the little independent distributor with a handful of pictures like we have, we would have to go out and sell in blocks of five.

The Court: That was what I had in mind, you made some such statement.

Now this contract you seek to offer now at this time, was the contract made after the entry of this decree in this case in New York?

Mr. Wright: That is right, Your Honor.

The Court: For what purpose is that contract here?

Mr. Wright: To show that by this contract the defendant Crescent, and the co-conspirator, Loew's, Inc., entered into an agreement whereby they agreed to serve the Loew films to the Crescent's Gadsden theaters and the independent theater in East Gadsden in a discriminatory manner, and [fol. 1100] an unreasonable manner; that, we say, is a violation of the Sherman Act in itself, and we are entitled to have it and prove it in this case, along with the other violations we are seeking to examine. As far as the decree is concerned, Your Honor, it is perfectly obvious, we do not think that decree would serve any purpose here, of course

it couldn't in the absence of the makers, and what is being done here, there would be no point or purpose of any of us appearing in th-s lawsuit, this decree which was entered in New York, which only affects certain selling methods of these five, was regarded as a solution as no solution of all the ills of the modern picture industry.

The Court: Well, apparently, it seems to me that the fact that this case was dismissed against the five distributors probably in effect would cure any question coming up about the entry of this decree, because you are not seeking any relief against them, they were parties to the decree, the exhibitors were not parties, and on the other hand the Government was a party. Now of course if you are seeking any relief against the distributors, I think the Government would be bound by the terms of this decree, that is only as against any distributors who are parties to the decree, and [fol. 1101] the Government would have to proceed according to the terms of the decree, but this relief as I understand it, is being sought against the exhibitors?

[fol. 1102] Mr. Waller: I want to say this, that meeting Mr. Wright on his own ground, that he expects to prove (1) contains unreasonable and arbitrary provisions and (2) that because the contract does contain unreasonable and arbitrary provisions, it is evidence of conspiracy. Now, before you can get to whether or not the contract is evidence of conspiracy, you have got to show that the provisions are arbitrary and unreasonable. I am informed by Mr. Raftery that in the Westway case, which involved a similar contract, a similar question, whether it was unreasonable or arbitrary, that it took two weeks to try the case. In other words, if your Honor ever gets to Mr. Wright's proposition, we have got to decide whether there was anything unreasonable and arbitrary. If we go into whether that was unreasonable and arbitrary, we can't do that on the testimony of one witness.

The Court: Well, I think that the consent decree will reflect somewhat on the question of what is unreasonable and arbitrary, because the Government is a party to this consent decree and there is a matter of policy set forth in the consent decree it is stated in there, it is recognized [fol. 1103] as to time and area and it is essential in the distribution and exhibition of motion pictures, etc. Of course, the Government can't insist on that in a case in New York, and insist on something directly opposite in

the State of Tennessee. And in determining whether any clearance complaint is unreasonable or arbitrary, there must be taken into consideration, and then it goes on and gives a list of things. That is merely setting forth a matter of policy.

Mr. Waller: We would have to go into every one of those items in each instance and go into the history of the different communities and of the different towns and the character of the community. It sets that out in Section 8, all those things that must be considered.

Mr. Raftery: Mr. Hayes, who was in charge of this consent decree, when he was selling such decree to Judge Garland, Page 368 of the record: "I may say, in that connection, that it has long been felt both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance, than to have the clearance fixed by some impartial arbitrator and this is [fol. 1104] precisely what is accomplished by Section 8." And he closed Section 8 on that note, and went on to Section 9.

The Court: All right. I will overrule the objection.

Mr. Wright: Q. Will you tell us, Mr. Bailey, what the discussion was that you had with Mr. Butler at the time the contract was made with reference to that subsequent run provision?

A. The contract stated subsequent run, as I understood it and as I interpreted it, a subsequent run meant a run after the actual second run in the city of Gadsden. Now, Alabama City is approximately four and a half miles from the Dixie Theatre and the Ritz Theatre in Alabama City. Mr. Butler told me that for years the Alabama City account had been set up as a first run account and it must be preserved that way, as far as the distributor was concerned. And he told me that because of that, he would have to have a subsequent run clause in our contract, which automatically gave Alabama City the right to run the pictures ahead of the subsequent run, that the subsequent run has to run after the first account. Pictures run by the Princess Theatre on approximately the release date, then thereafter there was a period of sixty days between the showing by the Princess Theatre before it would become available to the Dixie Theatre in East Gadsden, and in between the [fol. 1105] time, approximately two or three weeks after

playing the Princess Theatre, the picture would be run at the Ritz Theatre in Alabama City and after a period of approximately 30 days or 45 days, after it was run in the Ritz Theatre in Alabama City, it was available to us. I brought up the point that that picture should be made available in East Gadsden right after going to Alabama City, that all other considerations were about equal and that we would be willing to pay a film rental on a par with the Ritz Theatre in Alabama City. Mr. Butler told me then that it was the policy which had been set up and that he was not allowed to withdraw it, and if I wanted the pictures, I would have to get them subsequent run after Alabama City and it was take it or leave it and under those circumstances, I took them.

The Court: I think that would be covered under Section 8, whether the clearance is reasonable.

Mr. Wright: It certainly is.

Q. At the time you had this conversation with him about the 1940-1941 pictures and signed the contract for those pictures, was there anything said about the 1939-1940 product?

A. Yes, I asked him if it wasn't possible for us to get any part of it, of the 1939-1940 product, and at that time Mr. Butler said he was not in position to make any terms or come to any conclusions regarding his product, that some time would have to elapse until a deal was worked out for Crescent Amusement company and after that time had passed and they had made a satisfactory arrangement, he would come back, we would see if we could work out a deal [fol. 1106] on the 1930-1940 product.

Q. Did he come back to see you?

A. Yes, I believe it was in March, he came back and offered me a contract on the 1939-1940 product.

Q. Is that the first time he offered you 1939-1940 pictures?

A. Yes.

Q. You made a contract with him for them?

A. Yes.

Q. And he gave you Exhibit L—This contract dated March 11, 1941, accepted March 26th, is that the contract you made with them?

A. Yes, that is the contract.

Mr. Wright: Will you mark that as Exhibit L-1.

(Document marked Exhibit L-1)

Q. At the time you made that contract in March, had the Metro 1939-1940 product then begun to run?

A. Yes, in between the time I made the two contracts, it had begun to run.

Q. Then did you have any discussion with them about that same subsequent run clause that appears in that contract at that time?

A. I attempted to take up a discussion with him on it, but he told me that it would have to be approximately under the same conditions as the 1940-1941 contract, that he had [fol. 1107] been instructed that there was to be no change in the policy in the offering of the product, and that is the way I did it. I wanted it.

Q. Then did you have any negotiations for Fox product?

A. Yes, about the same time, along about the same period of time that we were negotiating with Metro, I was contacted by Mr. Mitchell of the 20th Century Fox Films, and he told me that he was in position to offer me a contract for Fox films for the season of 1940-1941.

Q. Now, I show you this contract dated November 12, 1940, marked Government Exhibit F-7 for identification and ask you if that is the contract you made with Fox?

A. Yes that is the contract.

[fol. 1108] Q. I call your attention to the language after the printed words "Clearance in run", "Subsequent, not less than three per month as available ninety days after first run Gadsden." Did you have any conversation with him about that clause?

A. Yes, sir, we had practically the same conversation as I did with Mr. Butler about it, bringing out the circumstances with regard to the position, quality and the size and other advantages of the two theatres, and I brought up the point that I felt strictly as a matter of right or wrong that we should have pictures made to us on a par with the Ritz Theatre in Alabama City. He told me, he gave me the same answer that Mr. Butler did on that practically; that that was the policy under which the contracts had to be drawn or written and that if I wanted pictures I would have to take them on a second run basis, which meant actually third run in the City of Gadsden and ninety days after first run at the Princess Theatre.

Q. Now, how long after they played the Ritz Theatre at Alabama City were those Fox pictures made available to you?

Mr. Waller: I object to that. That is too general, and different times probably with each picture.

The Court: What was the question?

(Question read).

[fol. 1109] By the Court:

Q. Well, can you tell generally?

A. I can tell generally. I can't give you any specific instances because I didn't watch it that close, but it was usually after, two months after they ran at the Ritz Theatre in Alabama City that they became available to us.

By Mr. Wright:

Q. That would be about a month after they played the Princess?

A. Yes, run on an average about a month after they played the Princess they run at the Ritz in Alabama City.

Q. Did you have any negotiations with Warner?

A. Yes, sir, along about the time some of the 1940-1941 product was being made available from the other companies Mr. J. H. Black of Warner Brothers Pictures called at the theatre with the purpose of selling the Dixie Theatre Warner Brothers' product for the 1940-1941 season.

Q. Did you make a contract with him?

A. Yes, sir.

Q. Is this the contract for the 1940-1941 product dated, application November 26th, 1941 and approved December 6th, 1941, the contract you made with him?

A. This is the feature contract. There were other contracts made for short subjects but that is the contract on features.

Q. That is the feature contract?

A. Yes, sir.

[fol. 1110] Q. I call your attention to the words "Under run" carrying the designation "Sub." That stands for subsequent?

A. Yes, sir.

Q. Under clearance "Pictures are to be made available fourteen days after second run."

A. That was explained to me that the pictures were actually to be first run downtown at the Princess Theatre, that is, a large number of pictures. Naturally some pictures they wouldn't care to run at the Princess, but that second run as specified in that contract meant under one of the downtown theatres, either the Gadsden or the Capitol Theatre, which were located within a few blocks of each other in downtown Gadsden; that the pictures would come to me after they had made a second downtown run. Now, in effect, the way the thing worked was that the picture was run at the Princess Theatre, then shortly after, approximately fourteen days after, two weeks or three weeks, it would run at the Ritz Theatre in Alabama City, constituting actually in the City of Gadsden a second run, then the picture would be run back downtown and would be run for a third time in the City of Gadsden at either the Capitol or Gadsden Theatres, then fourteen days after the actual third run the pictures would be made available for the Dixie, actually the fourth run in Gadsden.

Q. Was anything said with reference to the playing position of the Ritz Theatre at the time this contract was made?

[fol. 1111] A. Mr. Black said that the Ritz was set up on their books as a first run account and there was nothing he could do about it; that they had served that account there as a first run account for a number of years and that was the policy on which they sold pictures.

Q. Was there any discussion of film rental?

A. Well, we made—I told him at the time that if I could get the feature pictures on a par with the Ritz Theatre in Alabama City that I would be willing to pay film rental on a par with the Ritz Theatre.

Q. What did you mean by getting pictures on a par?

A. I mean available day and date play-off with the Ritz Theatre in Alabama City.

[fol. 1112] Q. Can you explain what day and date of availability is?

A. Well, for instance, if a picture becomes available on the first of a certain month, the date of availability to another theater would be that it would automatically become available to another theater in another town on the same date.

Q. Now, this contract with Warner Brothers also contains a provision where any picture is played, the exhibitor may substitute other pictures?

A. I explained to Mr. Black at the time that by the contract that certain pictures that were played at the down-town theater, the smallest house in Gadsden, would be subject to be played in my theater; and we made a commitment that I didn't want to run them at the Dixie, that I could pick up pictures out of the older product to be run at the Dixie Theater, and then pictures I picked up would be played again to that contract.

Q. Now, those pictures that you picked up were exhibited in what run in the City of Gadsden by you?

A. Well, that depends on how many times they had been run down-town; if they had been run down-town, it would have been fourth run; and some pictures of Warner Brothers might have been run as many as four times in Sudekum theaters.

Q. It might be a fourth or fifth run?

[fol. 1113] A. It might be a fourth or fifth run, yes.

The Court: All right; it is time to adjourn at this time. I am not at all satisfied about this proposition. Of course, if the Government contends that the Crescent Company in this case has violated the Sherman Act by entering into a conspiracy with these exhibitors to do these acts, well, the distributors are just as guilty of violating the Sherman Act as the exhibitors are.

Mr. Wright: That is right, your Honor.

The Court: And that the Government has not waived its right to proceed against the distributors in this decree except under the terms of this decree.

Mr. Wright: I think if your Honor will read the second paragraph in section one of the decree, that that point is cleared up, because that states expressly there that this Court has not determined or adjudicated, and by this decree does not determine and adjudicate to the effect that any of said defendants has violated or is now violating any [fol. 1114] such laws or any other statute. Now, the question of whether or not these defendants who consented to this decree are or are not law violators, was left entirely outside of that decree. All that was done was that a simple agreement was made in effect to dismiss the suit against them, and this suit, in return for their agreeing to set up an arbitration system which would deal with certain grievances, and adopt a new method of selling which the Government hoped would make the parties more competitive and

give a greater opportunity for actual competition to ensue in licensing films. Now, the fact that that agreement was made, of course, did not give any party to it any immunity from any claim of law violation simply because he abides by that agreement, because the agreement on its face does not purport to cover all violations of law as such.

The Court: Well, it, however, appears now, it would be the insistence of the Government, then, that the exhibitors and the parties to this agreement have not kept the agreement in good faith, does it?

Mr. Wright: There was no relief granted to any exhibitor in the decree.

[fol. 1115] The Court: I mean distributor. Did I say exhibitor; I meant distributor.

Mr. Wright: There is no contention that the distributors are not living up to the agreement made, in so far as the agreement goes, but the agreement on its face don't purport to cover all possible violations that might occur; if it had, we would, of course, have dismissed this suit at the same time we entered the decree. There would have been no point in pursuing any of these circuit cases any further, if we had felt that by this decree that we were disposing of all future violations in connection with circuit violations.

The Court: I say, though, it is the insistence of the Government now, in presenting this evidence that it is presenting to the Court at this time, that these distributors who have been dismissed from this suit and who are parties to this decree, are not living up to the requirements of the decree, and in fact, are violating the terms of it?

[fol. 1116] Mr. Wright: We don't allege they are violating the terms of the decree; we do allege they are violating the terms of the Sherman Act; the decree does not purport to deal only with the Sherman Act violation; in some respects it goes much further, and in other respects it doesn't go as far as the Sherman Act does. This decree does not enjoin any two or more defendants from conspiring together to do anything; and for that reason, it is not inconsistent at all, as I see it, for us to take the position that the exhibitors who consented to this decree have since that violated the act at the same time they were performing the obligations that they assumed in the agreement.

[fol. 1117] That case, Your Honor, that goes to the merits of the decree, would be to go into it, I do not think the de-

cree should be gone into here. Of course Mr. Raferty would prefer it to be a private consent decree, we are trying to try this lawsuit here and the Government has been trying to try this as a matter of judgment, we have tried this new method of selling and the arbitration system, what we are trying to do, we are attempting to make possible competition in the industry, we may not wholly succeed, but in any event the agreement was made in good faith to protect ourselves, although there was a trial period provided there, that in the event we are mistaken as to the effect of the provisions, and the future results, and they do not agree, the whole thing can be thrown out of the window and we proceed with the original divorcement suit. That trial we thought was worth dimissing these defendants from the suit for and settling this litigation. Now that obviously, that agreement that was made certainly did not give anybody any immunity from any charge of law violation, any more than the effect that it did not establish at the same time that any one had violated the law at all, we are leaving that [fol. 1118] for determination in the three circuit courts that we purposely left open, we left an opening at the time we made this agreement. In effect it was said, you can go out as parties, you will not have to incur the expense of defense, we will eliminate the charge but you are left in as having conspired with the exhibitor defendants.

The Court: This is in not just as a decree, the Court will undertake to get it in his mind. You all know more about this lawsuit.

Mr. Raferty: I would like for the Court to read Section 12.

Mr. Wright: If your Honor is going to read that degree, I would like to give Your Honor a copy that is readable, that fine print I think is not very good.

The Court: I will read it tonight. Adjourn Court.

(Court thereupon adjourned.)

[fol. 1119] Exhibit Correction

In connection with the testimony of E. W. Dozier on July 15th, 1941 the eighteen contracts offered as a group by Mr. Frolich and identified ad Defendant's Exhibit 35, have now been marked as Defendant's Exhibit C-35.

In connection with the testimony of W. P. Miller on July 15th, 1941, the seventeen contracts offered as a group by

Mr. Frolich and identified as C-36 have now been marked as Defendant's Exhibit No. C-36 (a).

[fol. 1120] Volume VIII

Thursday Morning, July 17, 1941

H. T. Bailey, Resumed. Direct Examination, continued.

By Mr. Wright:

Q. Mr. Bailey, after you had the discussion with the Warner representative and signed the Warner contract that was referred to yesterday, did you have a discussion with any United Artists representative about their product?

A. Yes, I had a discussion with Mr. Barnes, who represented United Artists in that territory.

Q. When was that?

A. That was about the same period of time that the other contracts were offered.

The Court: You mean 1940-1941 contract?

A. Yes sir, the 1940-1941 contract.

Mr. Wright:

Q. I will show these series of contracts, dated December 2, 1940, between Dixie Theatre and United Artists Corporation and ask you if those are the contracts, collectively marked Government Exhibit UA-3?

A. Yes sir.

Q. I call your attention to the provisions as to clearance, "Run subsequent clearance," the "Special arrangement to be applied as available." Did you have a discussion [fol. 1121] with Mr. Barnes at the time the contract was made?

A. I asked him exactly what that meant, as far as our running time was concerned. And he told me that the clearance, although that was not specified there, our clearance period between the down town theatres, Princess, and the Dixie would be a period of 90 days, and he said that the reason it was important for him to put "subsequent Run" in there on our run specification was in order that the Ritz Theatre in Alabama City might have the pictures before we

got them because the word "subsequent" as he explained to me means a run after second run in some other town.

Q. How long before United Artists pictures were made available to you, under that contract?

A. On an average of three months after they were run at the down town Princess.

Q. How long after they were run at the Ritz in Alabama City?

A. From a month and a half to two months, usually.

Q. What did you have to say about that?

A. We asked him why it was absolutely necessary that that contract be written giving the Ritz Theatre in Alabama City priority over the Dixie Theatre and I went into the matter of location of the other theatres and the Dixie [fol. 1122] Theatre with regard to the Ritz, and he told me at that time that he was not personally acquainted enough with the situation in Alabama City to be able to give me a concrete reason why that subsequent run had to be in there, but he told me that those were his instructions to sell the pictures subsequent run to Gadsden and if I wanted the pictures that is the way I would get them.

Q. Was there anything said about or with reference to making any United Artists Pictures available to you first run?

A. He told me at the time he sold us the contract that in the event the Princess Theatre, or Crescent Amusement Company, didn't wish to run any one of the United Artists Pictures, which were sold in that season, that after a certain period of time those pictures would become available to the Dixie Theatre first run.

Q. And have some of the films been available to you?

A. None of the pictures of the 1940-1941 season have been run first run. However, of the previous contracts that were sold there, there have been about 4 first run pictures shown since the theatre opened.

Q. How long after the Ritz did they become available to the Dixie?

A. Actually about six months after release.

Q. Did you have any, did you make any attempt to get a run of the current Paramount product for the Dixie?

A. Yes, I made a trip to Atlanta and went into the Para- [fol. 1123] mount office and talked to Mr. Folger, who was

the Booker there and told him that I would like to have a few Paramount pictures to fill in with, and he told me that I would have to make a contract for the entire year.

Q. That was for what year?

A. That was 1940-1941 season. And I told him that I would not be interested in writing the full contract, signing one for a year because many of the pictures on the contract were second rate pictures to start with, that we would not want to run, and in addition, they would already have had two or three runs in Gadsden before we got them, so I made a spot book arrangement with the office in Atlanta whereby I would get ten pictures out of their whole year's product.

Q. Was there anything said as to why Paramount product would have two or three runs in Gadsden ahead of you?

A. He said Mr. Sudekum had the first run contract, first run franchise and second run contract in down town Gadsden, and first run contract in Alabama City and told me that the picture would run first at one of the larger down town theatres, then if the picture merited it, it would be returned some time later to one of the other down town theatres, that is the Capitol of Gadsden Theatre, and in between times it would be returned to the second run theatre after it would be run first run in Alabama City first run. That would actually constitute fourth run when we got the picture.

[fol. 1124] Mr. Wright: If the Court please, I want to offer in evidence the contracts between Crescent and Distributors that have been previously given numbers here. The first is a contract——

The Court: What distributor is that?

Mr. Wright: Loew's; a contract dated November 5, 1940, between Loew's, Inc., for exhibition at the Capitol Gadsden, Belle and Princess, referring to the 1940-1941 product. That is marked Government Exhibit L-12, for identification.

Another contract, dated January 2, 1941 between Crescent and Loew's, for the exhibition of the Loew pictures for the 1939-1940 season at the Capitol, Gadsden, Princess and Belle.

Mr. Armistead: What is the date of that, January 2, 1941?

Mr. Wright: This is the second one; January 2, 1941. He asked also for contracts made between Crescent and Loew's for Alabama City, and in response—They were

included, of course, in subpoena and in compliance—We specified records that were in the file, in the subpoena, and we received the following statement from Loew's with respect to Alabama City: "Alabama City, Alabama, pictures were spot booked during 1939-1940 and there is no contract."

[fol. 1125] The Court: What exhibit is that, now?

Mr. Wright: The letter—If your Honor prefers, I will have to show the letter to Loew's and Loew's answer to us. They refer to other situations, is the reason I didn't offer them.

The Court: You haven't offered that in evidence yet?

Mr. Wright: I was just reading it, I will read the correspondence into the record, I think that would be proper, I want to keep these copies, it refers to two or three situations. I think it would encumber the record unnecessarily, to offer both of those bulky letters. I will do it if you want them.

[fol. 1126] The Court: Well, I just wanted to keep track of these exhibits because when it comes time for me to make a finding of facts it is going to be quite a job to search through all the exhibits and find what I want.

Mr. Wright: Well, I think we had better——

The Court: You mean just make part of it an exhibit?

Mr. Raftery: This is a unique way of having Loews testify to the manner in which they sell their pictures to the Ritz Theatre.

The Court: Yes.

Mr. Wright: This is, of course, subject to explanation. If anyone is produced from Loews to show that Mr. Thompson was wrong when he made that statement, of course, they are entitled to do it.

The Court: Who is the letter to?

Mr. Wright: The letter is dated July 5th, 1941, addressed to E. Stanley Thompson, Esquire, connected with the legal [fol. 1127] department. You see, we served a subpoena first and made a general subpoena covering all the contracts in the case, and then we made an arrangement whereby we would notify them as to the specific situations we were going into just like we have with defendant's counsel and they then would produce the contracts relating to those situations, and this is the letter that we wrote on July 5th specifically requesting contracts for this and a number of other situations, and in response they produced

the contract I just identified and explained the non-production of any contracts for the Ritz Theatre at Alabama City by the statement in the letter I previously read to you.

The Court: Now, what is that statement?

Mr. Wright: To get the whole thing, I will read our letter of July 5th: "Pursuant to instructions contained in your letter of July 3rd, 1941, we are hereby requesting you to furnish us all contracts subpoenaed for the following towns for the motion picture seasons indicated." Specified there are East Gadsden, Alabama, 38-39, 40-41; Alabama City, Alabama, 38-39, 40-41, inclusive; Gadsden, [fol. 1128] Alabama 38-39, 40-41, inclusive. Then their reply of July 9th, 1941:

"Enclosed herewith you will find all the contracts which you requested in your letter of July 5th, 1941, except the following:" It says: "East Gadsden, we have been unable to locate any contract for this town." We were able to produce the contracts obtained from Mr. Bailey.

"Alabama City, Alabama pictures were spot booked during 1939-1940. There is no contract."

Mr. Armistead: Now, may it please the Court, I respectfully submit that the Crescent Amusement Company is entitled to cross-examine the writer of that letter.

The Court: Yes, I sustain your objection.

Mr. Raftery: Not only that, the writer of that letter is one of the lawyers for Loews writing to the other lawyer.

Mr. Waller: I think the same proposition.—

The Court: I have already sustained the objection. There is no use arguing.

[fol. 1129] Mr. Wright: I think it is a question of how we are going to establish the non-existence of these contracts. Now, of course, we can call Mr. Stanley Thompson down here and I suppose Mr. Thompson will say that he had Loews records searched in order to comply with the subpoena and the contracts weren't found. Now, if that will add——

The Court: That is apparently what you will have to do.

Mr. Wright: If that adds anything to the letter, I don't know what it is.

The Court: They have objected.

Mr. Waller: You have got the district manager subpoenaed. He can testify to it. They have got a whole lot of other things in the record just like that, if your Honor please.

The Court: Well, I have admitted these various contracts to go in with the different distributors. I don't think I [fol. 1130] have permitted any letters that are in this same category to go in.

Mr. Wright: Well, we withdraw the letters and will make that proof if they prefer it.

The Court: All right. Except letters either addressed to the witnesses or to the Crescent Amusement Company. I have permitted them to go in.

Mr. Wright: We would also like to offer at this time the franchise agreement between the Crescent Amusement Company and Paramount Pictures Distributing Company, Inc., dated July 28, 1938 as of November 1st, 1937, which has been marked Government's Exhibit No. T-24 for identification, and I want to call attention to the fact that this franchise covers the Alabama City and Gadsden, Alabama situations, and paragraph 8-(e) of the franchise at page 13 contains this second run option which made it impossible for the Dixie at East Gadsden to get earlier run of this Paramount product.

The Court: That franchise was specifically exempted from this consent decree, wasn't it?

[fol. 1131] Mr. Wright: That is right.

The Court: All right.

Mr. Raftery: There is no claim that that franchise is illegal per se.

Mr. Wright: There certainly is.

Mr. Raftery: Let me ask this: if the franchise were made with the Dixie Theatre would it be the Government's contention that it would be illegal per se?

Mr. Wright: We haven't.

The Court: That is really not on the facts of the case.

Mr. Raftery: If your Honor please, just observe that all these franchises are exempt from the consent decree and are given a blessing.

The Court: Well, it is like the old expression of Rube Goldberg, it is different when it happens to you.

Mr. Raftery: It depends on whose ox is being gored.

[fol. 1132] The Court: Go ahead.

Mr. Wright: This clause 8 (e) in the franchise reads as follows:

> "The exhibitor may at its election exhibit for a repeat exhibition any of the feature photoplays li-

censed hereunder at any theatre covered by this agreement upon the same terms and conditions applicable to the Hopalong Cassidy feature photoplays in respect of such theatre, as set forth in the annexed Schedule A, and the Exhibitor agrees to pay as license fee for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said Hopalong Cassidy feature photoplays."

[fol. 1133] Mr. Wright: I would also like to offer a letter dated May 25, 1939, from Crescent Amusement Company to Paramount Film Distributing Corporation, with an acceptance noted thereon by Paramount Film Distributing Corporation, which purports to modify that second run option. I don't like to remove this from the folder containing our modifications, because we will eventually offer the franchise complete as modified by all the leases contained in this folder. I have had this particular letter marked as Government Exhibit No. P-25 and I will offer that at this time without detaching from the folder.

The Court: That is all right. That Exhibit No. P-25 is in your folder?

Mr. Wright: P-25 is contained in a folder which modifies the franchise made in P-24.

Now, Mr. Waller has asked me to read the schedule of rentals which appears in the franchise, Government's Exhibit P-24. That states that for each of the five years 1937-1938 through 1940-1941, inclusive, the rental shall be $10.00 plus a recording charge of $2.50 for the films at Alabama [fol. 1134] City; and the prices at the Princess and Capitol at Gadsden is $12.50 for each of the five seasons, plus a $2.50 recording charge. The modification as set out in detail, reads as follows:

"It is hereby agreed that the agreement between us dated July 28th, 1938 as of November 1st, 1937, covering theaters in the States of Alabama, Kentucky, and Tennessee, and all riders thereto, be amended by adding to Article Eighth, subdivision (c) of said agreement the following as though the same were originally contained therein:

"'With respect to each theatre licensed hereunder the Exhibitor shall notify Paramount in writing of its election to exhibit any feature photoplay for repeat exhibition at such theatre not later than thirty (30) days after the conclusion of the initial exhibition of each such feature

photoplay at any such theatre, and such repeat exhibition shall be held within one-hundred and twenty (120) days from the conclusion of the initial exhibition of such photoplay. It is agreed that Paramount will have prints for each such feature photoplay available for booking by the Exhibitor for such repeat exhibition during the aforesaid one-hundred and twenty (120) days. If no such prints shall [fol. 1135] be available on the dates selected by the Exhibitor, then the time of the Exhibitor to exhibit shall be within fifteen (15) days after such prints shall become available. If the Exhibitor shall fail to so notify Paramount in writing of its election, then and in such event, upon the expiration of thirty (30) days following the conclusion of the initial exhibition of such photoplay the Exhibitor's license to exhibit such photoplay for a repeat exhibition shall thereupon forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it.

"'If the Exhibitor shall have elected as aforesaid to exhibit for repeat exhibition any photoplay and shall fail to so exhibit such photoplay within the aforesaid period of one-hundred and twenty (120) days, the license fee for each such photoplay shall thereupon forthwith become due and payable to Paramount and the Exhibitor's license to exhibit such photoplay for repeat exhibition shall forthwith terminate and revert to Paramount and Paramount may license the exhibition of such photoplay when and where desired by it without accounting to or crediting the Exhibitor for any sums received therefor.'"

[fol. 1136] "As herein modified, the aforesaid agreement and all riders thereto shall be and remain in full force and effect and is hereby ratified and confirmed. Kindly signify your agreement hereto by signing underneath the words "Agreed to" at the bottom of this letter.

Very truly yours, Crescent Amusement Company, by Tony Sudekum. Agreed to: Paramount Film Distributing Corporation, by Morgan."

Mr. Wright: I would also like to offer at this time, if the Court please, two documents that I believe are known as Deal Sheets, which were a part of the Warner Brothers franchise. The first covers the Ritz Theater at Alabama City, Alabama, dated March 1, 1940, and carries a rider dated March 14, 1940, marked Government's Exhibit W-6. And

a similar Deal Sheet covering the Princess and the Capitol and the Gadsden at Gadsden, Alabama, bearing the same date. And a rider dated also March 14, 1940. The contract dated March 1, 1940, for the Ritz at Alabama City contains [fol. 1137] a rider which reads as follows: "Exhibitor shall have the right to repeat any feature at the lowest allocated rentals subject to all runs and clearance which may now exist or may hereafter be granted to other exhibitors in Alabama City, Ala., and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in such event the Exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

Should Exhibitor's playing time be reduced by reason of the closing of said theatre, then Exhibitor's commitment shall be reduced proportionately."

The Court: What is the number of that exhibit, please?

Mr. Wright: That is No. W-6. The same exhibit also contains the following rental provisions: "Clearance; 14 days over Attalla, Alabama; however, all features must be cleared 60 days after NRD." which, I presume, is National Release Day.

[fol. 1138] The Exhibit W-7, which is the contract covering the contract and rider, covering the exhibition of Warner product at the Princess, Capitol and East Gadsden, and reads as follows:

"The twenty (20) features licensed for second run exhibition shall be selected by exhibitor from the features licensed, first run, for each of the motion picture seasons 1939-40, 1940-41, 1941-42, and 1942-43, in the following manner:

"Within thirty (30) days after the last date of the exhibition of any feature, first run, exhibitor will notify distributor in writing whether exhibitor selects such feature for second run exhibition. Failure on exhibitor's part to so advise within said period with respect to any feature shall be regarded as a rejection by exhibitor of such feature for second run exhibition. Any feature rejected as herein provided may be disposed of by distributor elsewhere as and when it deems advisable.

Exhibitor shall have the right to exhibit any reissues, except Westerns, at the lowest allocated rentals, and in which event the exhibitor's commitment to exhibit the features in the lowest rental classification shall be reduced accordingly.

"Should exhibitor's playing time be reduced by reason [fol. 1139] of the closing of a theatre, then exhibitor's commitment s-all be reduced proportionately."

This contract provides with respect to run and clearance, first and second, twenty-one days over Attalla, Albertville, Guntersville, Center, Piedmont, Jacksonville, Boaz, and Coleyville; however, all pictures must be cleared within 45 days after N.R.D. I suppose that is National Release Day, or date.

Anyway, Mr. Bailey, with respect to Attalla, with reference to downtown Gadsden, where is Attalla with reference to downtown Gadsden?

Q. Attalla is about seven miles due west of Gadsden.

Q. And that is about three miles from Alabama City?

A. Yes, about three or three and a half miles.

Q. And how far from your house in Gadsden?

A. It is about eight miles.

Mr. Wright: I also offer in evidence the contracts which were made between twelve corporations, including the Crescent Amusement Company, Rockwood Amusement Company, Cherokee and most of the other defendants in this case, for the exhibition of these United Artists' pictures on seventy-three runs, first runs all with the exception of Nash- [fol. 1140] ville are first run, that is correct in something like seventy-three or more than a hundred theaters specified as operated by twelve different corporations in various towns in Alabama, Kentucky and Tennessee, including the town of the Ritz in Alabama City, and the Capitol Princess, East Gadsden and Gadsden, Alabama, the rental terms are simply the blanket amount for each picture for the exhibition in all of the seventy-three situations controlled by these twelve corporations.

The Court. Does it say what that amount is?

Mr. Wright. The first picture I believe it is two pictures of the seventy-three runs, eleven hundred dollars each.

The Court. Eleven hundred dollars each?

Mr. Wright. Eleven hundred dollars each for the two pictures the next one is for the seventy-three runs, twelve hundred dollars, that is the twelve hundred dollars to be paid to the United Artists by the twelve corporations for

the privilege of running the picture in the seventy-three situations covering two or three days each, except in one [fol. 1141] theater in Nashville where the run will be three or four days.

The Court: What is that? W-A-4?

Mr. Wright: W-A-4, that is marked U. A. 4 collective exhibit.

The Court: What is the date?

Mr. Wright: The contracts have a date of abrogation, November 22, 1940, and there is a statement I believe as to approval, approved in accordance with wire from Mr. Paul Lazareth, dated November 20th, 1940.

Mr. Raftery: May I see it? (Passed to Counsel.) The contract speaks for itself, Mr. Wright didn't begin to mean there were seventy-three runs because you find there may be different times, you have to analyze that contract.

Mr. Wright: As specified on its face.

Mr. Raftery: This is a bulk deal, where you sit down and sell a number of the Sudekum circuit, for instance, your [fol. 1142] product, and instead of fussing about each individual situation, whether you pay ten dollars or twenty dollars, you arrive at the bulk figure and you pay all right, and say I will sell you these towns for these prices specified, for example, I will go on with the producer and he sells United Artists, he sells seventy-three runs and these runs are specified, the two pictures are on a basis of eleven hundred dollars apiece; on the third picture he got twelve hundred, on the fourth he got thirteen hundred, on the fifty film or picture he got fifteen hundred. Then you know you *know you* haven't got to go into the next situation, where you get a particular picture from another producer, he sells the Westerns for seventy-three runs for eighteen hundred dollars. Wuthering House eleven hundred dollars, that is an older picture, and come down to where it will correspond to Good Voyage, may be these three the third he gives thirteen hundred and fifty dollars. Now each of these pictures has seventy-three runs, it goes on that way for around twelve or fourteen pictures involved in the whole thing, and each price is separate for each picture, and each producer's contract is a separate document, until they have [fol. 1143] the deals pretty much dealt with. Each of these riders is attached to each of these transmittal sheets, deals, runs and towns, and there is no allocation of prices to any

town. Now the Ritz theater at Alabama City were are talking about now, is some part, not allocated.

The Court: A one-seventy-third.

Mr. Raftery: We do not sell them that way.

The Court: I say it is one-seventy-third.

Mr. Raferty: May be an illustration of it.

Mr. Wright: These as I understand it, are all the contracts providing that they are put in seventy-four theaters, followed by Crescent at Gadsden, Alabama, for the 1940-1941, pictures, that have been produced. Is that correct, Mr. Raftery?

Mr. Raftery: That is correct, and also Mr. Stengel reminds me I did not know this, not being in the cashier's department, when they ran the first of the seventy-three [fol. 1144] they paid the whole consideration.

The Court: Are you testifying now?

Mr. Raftery: Well—it is in the contract.

Mr. Waller: Your Honor please, we are somewhat in the dark as to the purpose of these exhibits.

The Court: I suppose it will come out before long.

Mr. Wright: I would like to offer at this time purchases for this time, dated July 20, 1940, covering the period of 1940-41, to 1941-42, covering that product, between 20th Century Fox Film Corporation and Crescent Amusement Comapny and Lyric Amusemtnt Company which has been *gotchter* identified, marked for identification as Government's Echibit F-A. This has attached to it the so-called deals, in, which will show the individual sit-ations which are all included in the Branch for the various situations in Alabama, Tennessee and Kentucky, and the deal sheet too for Alabama City, Alabama, is dated June 27, 1939, and that for Gadsden, Alabama, bears the same date. [fol. 1145] The Alabama City provision with respect to run, first clearance after Attalla, Alabama, provided pictures are played within twenty-one days of the National Release date, that the clearance provided the first run over East Gadsden provided they were played twenty-one days after National Release Date. Then there is a further statement as to clearance date over other towns.

Mr. Raferty: Your Honor, I do not mean to testify. I merely want to call attention to the provision in there as to the date of those things.

The Court: All right.

Mr. Waller: Your Honor, we object to all these exhibits for the purpose of finding out the purpose for which they are offered.

The Court: In this last exhibit it looks like it refers to Attalla, Alabama, more than it does to East Gadsden; what connection does that have with it?

Mr. Wright: We simply want to show that so far as [fol. 1146] these distributors are concerned that was all one trade area there, it was no excuse for granting clearance over Mr. Bailey, unless you recognize the fact that Attalla, Alabama City, Gadsden and East Gadsden are all in the same competitive area, and so recognized by the distributors themselves at the time they made the agreements, and pushed the Dixie out of East Gadsden, and the Ritz at Alabama City, is not competitive and the Dixie, and that is the result of it there.

Mr. Waller: We object to that, is that something new put in there or was this set up before the Dixie was built?

The Court: Well I guess you will have the opportunity to show they were in there before, if they were.

Mr. Waller: We say that evidence is immaterial unless the Government makes that competent, I am basing it on the ground of immateriality.

The Court: He said he had been doing this for a long period of time.

Mr. Waller: He says we did that to squeeze this fellow [fol. 1147] out; the fellow wasn't there.

Mr. Wright: Obviously he couldn't squeeze him out when he was not there, but the point is if they did keep on doing it when somebody came in there, the whole set up was expressly designed for that purpose, prevent any one opening a theater when he stayed there, he could not get the films to which it was entitled, based on the rental time, he could afford to pay, they attempted by these franchise agreements to freeze the entire distribution set up in the towns where they might have competitio or where any competition might arise in periods of from three to five years. We say that any agreement has that purpose and effect, it is obviously an attempt to do this, and the section with respect to these second runs put in the Warner and Paramount agreements was to prevent anybody else who might come into a situation from getting a second run of the pictures Crescent did not even have to buy a second run to keep them out of there, so all they had to do was

to make this option so then if it appeared anybody else wanted the run, they would exercise their option and take it, there wasn't any effort obviously, didn't appear of course, [fol. 1148] because they would not violate those agreements, for other means that were illegal so certainly those are to the effect that I have just illustrated here in this Alabama City, East Gadsden, and Gadsden situations, where a theater is put up, that is plainly entitled to secure films second run at least in the city of Gadsden, and can't possibly get because of this agreement.

If there are any of those documents that have been identified that I have not offered, I will offer them all now. And that is all.

I believe there was one other letter here from Loew's Inc., written to Mr. Bailey under date of September 26, 1940, marked Government's exhibit 88 was that letter received by you, Mr. Bailey, on or about the date it bears?

A. Yes, sir.

The Court: From whom?

Mr. Wright: From Loew's, Inc., to Mr. Bailey, it says:

> "We have your letter of September 25 asking whether or not our records indicate that your 1938-39 contract was completed. Our records indicate that both the feature and the Junior Feature contracts have [fol. 1149] been completed with the bookings which we now have set.

Mr. Frolich: The exhibits have been absolutely confused, we have no exhibit number 88, we have no such exhibit.

Mr. Wright: I think that letter is in evidence already and the numbers, it bears a different number, 89.

The Court: What is the number, Mr. Clerk?

Mr. Wright: I believe you have Government's exhibit 87.

The Clerk: Letter of September 20th, 1940, to Loew's, Incorporated to Mr. H. T. Bailey, Jr., and here is 89 from the Dixie Theater, of October second, 1940, to Loew's incorporated.

Mr. Wright: Well that is what I thought. I want these marked collectively.

Q. That letter that is referred to there, did you have a copy of that letter, Mr. Bailey?

A You mean the copy of the letter that I wrote to Loew's, incorporated?

Q. Yes?

[fol. 1150] A. Yes, I had a copy of the letter, and turned it over to an F. B. I. agent, along with some other correspondence.

Mr. Wright: We have not been able to find the letter of September 25th.

Q. Can you tell us anything about it?

A. I wrote to Loew's incorporated and asked them if we had fulfilled our contract as far as what pictures, and what I supposed had been bought previously.

Q. The letter of September 25th didn't have anything to do with film negotiations then?

A. No, I was just asking them to see if we had anything left of their product coming, if we should do anything and we would do everything we could to get it and also make sure we had fulfilled our obligations, and to be sure there would not be any misunderstanding about these contracts w-en we made an at-empt to get newer product.

Mr. Wright: I will offer that letter of July 27, 19— that has been identified in evidence.

Mr. Waller: Your Honor that letter simply brings up the proposition that the letter from Loew's stating what the records show, even if it was addressed to the witness, it is heresay testimony.

[fol. 1151] The Court: What difference does it make?

Mr. Waller: I don't think it makes any, only it is not competent evidence.

The Court: I do not see how it bears on the suit, just says they fulfilled their contract.

Mr. Wright: I do not think it ma-es any difference particularly, but there was a suggestion here the other day that went into the correspondence, that all of it ought to go in.

The Court: Don't pay too much attention to that suggestion.

Mr. Wright: I take it that if these contracts as well as that letter ha-e been received in evidence, it should be noted.

The Court: All right.

Mr. Raftery: That all you have here?

Mr. Wright: Yes, I am now offering all the contracts we [fol. 1152] identified here today and yesterday.

The Court: Identified by this witness during his testimony?

Mr. Wright: Yes.

Mr. Raftery: Do you offer the United contracts?

The Court: Yes, let them be admitted.

Mr. Wright: Cross-examine him.

Cross-examination.

By Mr. Waller:

Q. What is the population of East Gadsden, Mr. Bailey?

A. Just as an estimate at the present time it is around five thousand persons.

Q. And when this theater was built it was about seven thousand?

A. I don't know how much it was when the theater was built, because I was not there.

Q. You knew nothing about the purposes for which this theater was built?

A. I knew nothing about the purposes, there are a good many rumors gone out but all I know is since I came there.

[fol. 1153] Q. Your first connection with the theater then was in September, 1940?

A. Yes.

Q. So far as the purpose of the theater is concerned, I suppose you would accept the testimony of the president of the corporation that it was built because he believed the people of East Gadsden did not want to pay the prices charged at the Princess theater, and did not want to go that far to get to the Alabama City theater?

A. Yes, I think that is about true.

Q. You think that is about it?

A. Yes, sir.

[fol. 1154] Q. It is about a ten mile trip over to Alabama City?

A. I would say about 9 miles over there and back, the round trip.

Q. Your complaint is that some of those people in East Gadsden are still going over to Alabama City to see pictures?

A. That is correct.

Q. You don't have any objection to the proposition that the Princess Theatre has a 60 day or 90 day clearance over your theatre?

A. No, I couldn't expect to show without any clearance there. In fact, the way the pictures are shown down town, they run so close to release date, we would still get pictures within a reasonable time to run. Our objection is the Ritz Theatre in Alabama City, which isn't near as good a theatre so far as construction is concerned, not so many seats, can have priority over us and show pictures which we are entitled to.

Mr. Waller: I object to the answer as not responsive to the question.

The Court: Objection overruled.

Mr. Waller:

Q. Let me understand you, then. Is your argument which you make, if there was no theatre in Alabama City, if that theatre didn't exist there, your clearance would be all right, that is correct, isn't it?

[fol. 1155] A. If a theatre didn't exist in Alabama City?

Q. Yes.

A. If there wasn't any theatre in Alabama City, there would be no clearance with regard to Alabama City.

The Court: He says he has no objection to the Princess Theatre clearance, his only objection is the clearance of the Ritz at Alabama City over him.

Mr. Waller:

Q. Your objection is really to the existence of a theatre in Alabama City?

A. No; the objection is to that theatre, with no better facilities than ours, can get clearance over us.

Q. Your objection is that you have got a 60 day clearance over your theatre, the Dixie, by the Princess Theatre, and there is no 60 day clearance of the Princess over the Ritz?

A. They are running pictures in less than two weeks after the Princess.

Q. You know those two theatres are owned by the same corporation and operated by the same corporation?

A. Yes.

Q. Your contract doesn't provide that Alabama City, the Ritz, has any clearance, and if the Ritz in Alabama City played two weeks after the Princess, you couldn't play them

anyway until 60 days after the Princess, so that wouldn't make any difference?

[fol. 1156] A. Yes it does make a difference, too.

Q. In other words, that doesn't delay you; as soon as the sixty days is up, you get the pictures?

A. That is correct.

Q. Your complaint is, before the sixty days is up, they are played at Alabama City?

A. That is correct.

Q. You don't like it because some of the people in East Gadsden go over across town to Alabama City to a theatre that was there long before the Dixie opened, or was ever built?

A. Well, I wouldn't say that I don't like it so much, except for the fact that we should have an equal chance. I don't like that, anymore than the managers of the Ritz like the other people to come over to the Dixie.

Cross-examination.

By Mr. Raftery:

Q. Do you draw from the whole city of Gadsden?

A. Our biggest drawing area is in the section of East Gadsden, East of the Coosa River,. East Gadsden, proper, we draw to some extent from the other parts of the town.

Q. You draw from the whole city?

A. Yes, a small part of our draw comes from over in Gadsden.

Q. Capt. Barnes was the United Artists salesman?

A. Yes sir, that is his name.

[fol. 1157] Q. Cap told you that he had first run sold to the Princess?

A. Yes.

Q. And second run out at the Ritz?

A. He didn't make any specific statement about the Ritz Theatre, in Alabama City. He said he personally was not well enough acquainted with the contents of the Ritz contract to give me a definite reason for it.

Q. You knew at the time you sent your applications for contracts, that you have identified today, that a run would be had of those particular pictures at the Ritz Theatre before you showed them in East Gadsden?

A. Yes, I did.

Q. You were not misled at all about it?

A. No, we were not misled.

Q. Then you signed up these applications for contracts to show the United Artists Pictures in East Gadsden?

A. Yes.

Q. By the way, how many pictures did you buy?

A. We bought 17 pictures on 11 contracts.

Q. What was your playing time?

A. Ninety days behind the Princess.

Q. No, how many days did you play?

A. Two days.

Q. So the maximum amount of your playing time was used up in approximately 34 days on United Artists pictures?

A. Yes.

[fol. 1158] Q. What is your complaint? Do you want to play day and date with the Ritz?

A. Yes. What our main objection is, to have the same basis on which we could get films as the Ritz Theatre in Alabama City.

Q. In other words, you want to have a print of each picture available to your house and a print over at the Ritz on the same day?

A. Not necessarily a print, but just an available date where within that close period we could get the picture.

Q. You want to play pictures day and date with the Ritz?

A. No.

Q. You would want to play ahead of the Ritz?

A. Not necessarily.

Q. Would you want to play immediately after the Ritz?

A. We are willing to play within three or four days of the Ritz.

Q. But you don't want to divide the audience on the same day?

A. It wouldn't divide the audience on the same date as the Ritz.

Q. Don't you draw from Gadsden?

A. I told you the biggest part of our drawing area was here in East Gadsden where we are located; we have got enough people and we don't really need to draw from Gadsden.

Q. You have been making statements of the crowd going [fol. 1159] from your house across the river, several miles,

down to the Ritz Theatre. Have you checked the audience at the Ritz?

A. I have gone over there a few times. I have had people tell me they went over there.

Q. Have you found any of them, yourself, over there?

A. Yes.

Q. How many?

A. Only a few at a time.

Q. Three or four?

A. No, more than that, several cars, I wouldn't try to say how many.

Q. How many?

A. I would say five or six, every time I was over there.

Q. How many would you see over at your house on a particular night from the other part of the city?

A. You mean, from Alabama City sections?

Q. Yes.

A. Very few, if any.

Q. As a matter of fact, you don't consider the two houses competitive at all, do you?

A. No. They are competitive as long as they have the pictures so far ahead of us and can advertise those pictures so far ahead of us.

Q. Let me ask you this: In the 17 pictures, have you [fol. 1160] played any of those 17 United Artists pictures?

A. Yes, just as soon as they became available.

Q. Did you play the "Thief of Bagdad"?

A. No, it isn't available.

Q. What have you played?

A. I can't call the names of the pictures right off hand. I have had so many in my mind in the last few days. We played "The Westerner," "Foreign Correspondent," and along in there. "So Ends our Night" and other pictures like that.

Q. Isn't it true, Mr. Bailey, that the attendance at your theatre wholly depends on the particular picture you are playing?

A. No, not necessarily.

Q. Did you play "Boom Town," a product of Metro?

A. Yes.

Q. How late did you play that?

A. We played the picture after it was played at the Princess, and from the Princess down to the Ritz in

Alabama City, about two months after the Princess and about a month and a half after the Ritz.

Q. How long after the national release date?

A. I don't know. It was released in the 1939-1940 season, it had been released a long time.

Q. You played it a year and a half after the release?

A. Yes.

[fol. 1161] Q. You did a pretty good business with that?

A. We did a fair business.

Q. In fact, you do a good business when you have a good picture?

A. Yes.

Q. And if you have a bad picture you find that your business isn't so good?

A. Sure.

Q. Mr. Bailey, one other question: Saturday is your best day?

A. No.

Q. What do you play on Saturday?

A. Western and action pictures.

Q. You do pretty well on Saturday?

A. Fairly well.

Q. You do very well?

A. We do pretty well.

Q. Considering what you pay for your program, you do very well?

A. No, not considering what we pay for a double feature and a serial and shorts.

Q. That is what your public demands on Saturday?

A. Yes.

Q. You cater to your public, then, on that?

A. Yes, naturally.

[fol. 1162] Redirect examination.

By Mr. Wright:

Q. With reference to the good pictures that Mr. Raftery questioned you about. Does it make any difference to you whether you play a good picture 40 or 60 days behind the Ritz in Alabama City?

A. Yes sir, it does.

Q. It makes a bad picture that much worse, to have to play it 30 or 60 days behind the Ritz?

A. Yes, because by that time all the people that have seen the picture in Alabama City, they generally broadcast the fact that it is a bad picture.

Recross-examination.

By Mr. Raftery:

Q. You said you didn't consider buying any of the bad pictures, you only wanted to pick from Metro and the other big Companies like that?

A. I didn't make the statement I wanted to pick.

The Court: I take it from what the witness said, if he got a bad picture and if he got it soon enough so that the public didn't find it out soon enough to advertise it, that was all right.

Mr. Raftery:

Q. Did you play "Rebecca"?

[fol. 1163] A. Yes sir.

Q. Well, how did you do on that?

A. We did a very good business, but we were very much disappointed, it wasn't what we expected.

Q. Did you ever play a picture that was really satisfactory to you?

A. Yes, we have.

Q. What picture was that?

A. There were several that were satisfactory.

Q. Tell us one?

A. Well, "Boom Town" was a very satisfactory business there.

Q. That you played a year and a half late?

A. But there is another point there, the fact that the other theatres in Gadsden played them a year and a half late, almost a year and a half late. In 1939-1940 the product wasn't run in Gadsden on release.

Q. You played it after the Ritz?

A. Yes.

Q. You played it after the Capitol?

A. No, not——

Q. After the Princess?

A. Yes.

Q. And after Gadsden?

A. No.

Q. After Attala?

[fol. 1164] A. Attalla had played it eight or nine months before even the Princess ran it, because they were running the 1939-1940 product when it wasn't being run in Gadsden.

Q. But you never had much trouble with good pictures, no matter, really, when you play it.

A. No, we don't have any trouble.

Q. You think you could make more money if you could play them sooner?

A. I don't think we could make more money, I knew that we could make more money.

Further this deponent saith not.

[fol. 1165] TIM W. SMITH, next witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dobey:

Q. Will you state your name and address?

A. Tim W. Smith, Knoxville, Tennessee.

Q. What is your occupation, Mr. Smith?

A. Pictures, moving picture shows.

Q. Where are you operating theaters?

A. Knoxville and Fountain City, Tennessee.

Q. How long have you been operating theaters at those points?

A. Oh about fourteen or fifteen years.

Q. Are those theaters owned by you *u*ndividually or are they owned *v*y corporation?

A. Corporations.

Q. What?

A. Peerless Enterprises, Inc.

Q. What interest do you have in the company, what stock in. .st?

A. I own fifty-five per cent.

Q. Fifty-five per cent of the stock?

A. Yes, sir.

Q. On or about March 26, 1937, did you or not open a theater at Morristown, Tennessee?

[fol. 1166] A. Yes, sir.

Q. And on or about December 13, 1938, did you close that theater?

A. Right about that date I guess.

The Court: When was that?

Mr. Dobey: December 13, 1938.

Q. On or about June 17, 1938, did you open a theater at Harriman?

A. Yes, sir.

Q. And on or about December 13, 1938, did you close the theater there, at Harriman?

A. Right around that date, yes, sir.

Q. On or about September 2, 1938, did you open a theater at Newport?

A. Yes, sir.

Q. On or about December—no; on or about November 19th, 1938, did you close the theater at Newport?

A. Yes, sir.

Q. Now on or about January 28, 1939, did you reopen the theater at Newport?

A. No, sir.

Q. Did you ever—beg your pardon; On or about January 28, 1939, did you reopen your theater at Harriman?

[fol. 1167] A. Yes.

Q. Did you continue operating that theater until on or about February 10, 1940?

A. Yes, sir.

Q. At the time you began constructing theaters at Morristown first Harriman, second and Newport third, were there any other theaters already located in those towns?

A. There was a theater in each town.

Q. Who owned those theaters?

A. Crescent Amusement Company.

Q. Now with respect to the theater at Newport, was that theater owned by the Crescent Amusement Company, or by the Newport Amusement Company, affiliated with the Crescent Amusement Company?

A. I think it was the Newport Amusement Company affiliated with the Crescent Amusement Company.

Q. In August 1938, after you had opened your theater at Morristown, something over a year before that, sometime about March 26, 1937, did the Crescent Amusement Company open a third theater at Morristown?

A. Yes, sir.

Q. And the name of that was what?

A. Let's see, I believe the name of it was the Ritz.

Q. Now at Newport, I believe you stated your theater was opened at Newport on or about September 2, 1938?

[fol. 1168] A. Yes.

Q. Did the Newport Amusement Company open an additional theater in that town on or about August 30, 1938, a few days before yours opened?

A. Yes.

Q. At Harriman, Tennessee, after you closed your theater, on or about December 13, 1938, did the Crescent house there burn down?

A. Yes, sir.

Q. And did you then reopen your theater?

A. Yes.

Q. And did you continue to operate it until about February 10, 1940?

A. Yes, sir.

Q. What did you do with it then?

A. I sold it out to the Crescent Amusement Company.

Q. When the Crescent theater at Harriman burned, did the Crescent open another theater?

A. Yes, sir, they opened another theater.

Q. How long was it after that theater burned before it opened another?

A. I imagine it was around three weeks.

Q. Did they then begin the rebuilding of the old one also?

A. They waited I guess thirty days, then they started building on it, something like that.

[fol. 1169] Q. Did they complete the rebuilding of the one that burned down?

A. Yes.

Q. In about how long?

A. Well it seemed like it was about five or six months, I couldn't say for sure.

Q. After the old one that had burned down was rebuilt, did they continue to operate the one they had constructed immediately, as well as the new one they had rebuilt?

A. Yes, sir, they continued to use it.

Q. Did they still operate two theaters there?

A. Yes, sir.

Q. At Morristown, Tennessee, I believe you said you opened a theater there on or about March 26, 1937?

A. Yes, sir.

Q. What was the seating capacity of that theater?

A. Let's see, I believe it was three hundred fifty-two.

Q. What admission price did you charge?

A. Twenty cents, ten and twenty.

Q. Now with respect to the theater was that then operated there by the Crescent Amusement Company, what was the approximate seating capacity?

A. Well I imagine the seating capacity of that theater would be about seven hundred to seven hundred and fifty seating capacity.

[fol. 1170] Q. And what was their admission price for adults, at night?

A. I believe that was twenty-five or thirty cents.

[fol. 1171] Q. You were cheaper than they were?

A. Yes, sir.

Q. When they opened that third theatre in Morristown, on or about in the month, on or about August, 1938, what admission price did they charge at that third theatre, the Ritz?

A. 10 and 15.

Q. Ten and fifteen cents?

A. Yes, sir.

Q. That was less than you were charging?

A. Yes, sir.

The Court: How many seats did it have, the third theatre?

A. I think it had around 350, I wouldn't say for sure; close to that.

Mr. Dobey:

Q. Now, when you opened your theatre at Harriman, Tennessee, on or about June 17, 1938, well, what was the seating capacity of your theatre?

A. I believe it was 625, as well as I remember.

Q. What admission prices were you charging for adults?

A. Ten and twenty cents.

Q. At Harriman?

A. Adults 20 and children 10.

Q. What was the seating capacity of the Crescent Theatre that was operating there at that time, approximately, if you know?

[fol. 1172] A. The old theatre or the new?

Q. The old, the one that they operated when you first went there?

A. I think it was about the same seating capacity.

Q. As yours?

A. Yes.

Q. What admission prices were they charging?

A. I couldn't say for sure but I believe they were charging 30 cents, when I first went down there.

Q. Were you cheaper?

A. Yes.

Q. Now, with respect to the theatre that was opened at Harriman when their other theatre burned down in the latter part of December or January, 1939, what were their admission prices?

A. Well, I couldn't hardly say for sure, but I believe it was 20 and 25 cents.

Q. Was it under your admission prices, or about the same?

A. Well, about the same admission price. Well, this new theatre, the old theatre was burned down, you see.

Q. After they completed their new theatre, was it still the same admission price?

A. I think he brought it down to 10 and 15 cents.

[fol. 1173] Q. Was that under your price?

A. Yes.

Q. At Newport, Tennessee, when you opened your theatre there on September 2, 1938, what was your admission price?

A. Ten and twenty cents.

Q. What was the seating capacity of your theatre?

A. I believe it was 415.

Q. What was the seating capacity of the Winston Theatre that had been operated there by the Crescent Amusement Company for some time, approximately, if you know?

A. Well, I imagine it was around 600 or 650 seats.

Q. What was their admission price for adults at night?

A. I believe it was 25 cents.

Q. What was yours?

A. 10 and 20 cents.

Q. Your price was less as to that theatre?

A. Yes.

Q. The third theatre or the other theatre that was opened in Newport on August 30, 1938, what was the seating capacity of that theatre, approximately?

A. I think it was around 400.

Q. What was their admission prices for adults at night?

A. 15 cents.

Q. That was less than your admission prices?

[fol. 1174] A. Yes, sir.

Q. You were boxed up in every one of those situations, weren't you?

Objection by Defendants.

The Court: Objection sustained.

Mr. Dobey:

Q. What is the approximate population of Morristown, Harriman, and Newport?

A. Well, I imagine Morristown is around 10,000; Harriman is around 5,000 or 6,000, and Newport about 4,000.

Q. About 4,000?

A. About 4,000.

Q. What were the circumstances that led you to open the Palace Theatre at Morristown on or about March 26, 1937?

A. Well, I was up there once or twice and I seen these other theatres doing a big business, they were standing out waiting to get in and it looked like there would be room for another theatre there, so I went down and looked at a building over there and took a lease on it.

Q. Well, at the time did you consider the town was large enough to support two theatres?

A. Yes, it was plenty large for two.

Q. Did you know Mr. Sudekum then?

A. No. I wasn't acquainted with Mr. Sudekum at that time.

Q. Never met him?

[fol. 1175] A. Not at that time.

Q. You leased and remodeled a building there at Morristown?

A. That is right.

Q. Mr. Smith, after you started with remodeling the building at Morristown, about how long was it before Mr. Castleberry came around?

A. Well, I imagine it was about maybe a week or two weeks, until he came around.

Q. What did he say?

A. He wanted to know if I wanted to sell this theatre. He first made himself acquainted as Mr. Castleberry, of the Crescent Amusement Company and asked me if I wanted to sell.

Q. Had you ever seen him before?

A. I don't believe I ever seen him before. I told him I would sell most anything I had but I wasn't anxious to sell, that I wanted to go in the theatre business up there. And he said that Mr. Sudekum had sent him up to see what I would take for the place, and I gave him a price on it. He said, "Well, I will have to let you know in two or three days." I said, "all right". So he went away and didn't come back, I didn't hear anything from him. Then after I put the theater up at Harriman——

Q. Just a minute. Did you plan to operate the theatre at that time?

A. Oh yes, sure.

[fol. 1176] Q. Is that why you went into Morristown?

A. That is why I went into Morristown, yes, sir.

Q. You felt that the town was large enough for two theatres?

The Court: He said that.

A. It was plenty large for two.

Mr. Dobey:

Q. When did he come back, how long after his first visit?

A. Well, after I got the theatre started in Harriman, there was about sixty days until he came back again.

Q. Was your theatre open at that time?

A. Yes, it was open at that time?

Q. What did he say?

A. Well, he says, "Mr. Tim, I have come back to see you again, to see if you wanted to sell." "Well," I said "I don't know as there would be any use to give you a price on it." He said, "Yes, Mr. Sudekum had sent him back to see me; and I gave him a price again. He says, "I will let you know." So that was the last time I had seen Mr. Castleberry for about around eight months, six or eight months.

Q. All right, just a moment. About six or eight months later did you take a lease on a building at Harriman for the purpose of opening a theatre there?

A. Yes.

The Court: I thought this all happened at Harriman? [fol. 1177] Mr. Dobey: No, this is Morristown, now. We are now moving on to Harriman.

Q. These conversations between you and Mr. Castleberry were all at Morristown?

A. Yes.

The Court: I misunderstood him, I thought he said the theatre at Harriman was doing a big business?

A. No, I said after I started at Harriman building a theatre, then Mr. Castleberry came to see me.

The Court: After you started at Morristown?

A. No, I said, after the theatre got started and under way at Harriman, Castleberry came back again to see me, that is where you got mixed up.

The Court: Where are you then?

A. I might have been in Knoxville, I wouldn't say for sure. I believe it was Knoxville, when he came back to see me.

The Court: I thought you said Castleberry came to see you two or three weeks after you opened the Harriman Theatre and wanted to know if you wanted to sell and you made him a new price, you made him a price and he left and said he would let you know in two or three days, then he came back in sixty days.

A. No, I said at Morristown, he came there when we first [fol. 1178] began working, after working two weeks, and he said he would be back in two or three days, he didn't say he would be back, he said he would let me know in two or three days. After sixty days, after the theatre at Morristown got to going, he came back.

The Court: Was that with reference to buying the theatre at Harriman or Morristown?

A. Morristown.

Mr. Dobey:

Q. After this last visit just mentioned, he didn't come back again, not until you had taken a lease at Harriman?

A. That is right.

Q. Would that be the early part of 1938?

A. Yes sir, about.

Q. Were you making any preparations to open a theatre at Harriman?

A. I believe that we was working on a building at that time.

Q. Why did you decide to open a theatre at Harriman, a second theatre?

A. Well, Harriman has always been a good town; I started to go into Harriman about four years before I did get into Harriman. I looked at a lot up there, pretty close to the Sudekum house.

Q. Did you think the town was large enough to support [fol. 1179] two theatres?

A. I thought it was plenty large enough for two theatres.

Q. What was said by Mr. Castleberry at the time he came back after you had taken the lease on the building at Harriman, Tennessee?

A. He came back and said Mr. Sudekum had sent him back again and he would like to buy a half interest in the enterprise in Harriman, Newport; and Morristown, all the theatres I had. I told him, well, was he sure of that. He said, yes, that Mr. Sudekum wanted him to see me. I said, well, I will tell you what you do, you call me up and let me know what day you want me to come down there and I will go. So, he called me up over long distance and told me to come on down. So I went down and saw Mr. Sudekum.

Q. What was said on that occasion, between you and Mr. Sudekum?

A. Well, I told him that Mr. Castleberry told me that he wanted to see me about buying out the theatre. He said, Well I hadn't told Lee a thing about it. Well, I said, I am sorry, I wouldn't have come down here if I had known you didn't want to buy. They he got to talking and kept talking; in Mr. Sudekum's office and he wanted to know what I was paying for pictures at these places, and I told him what I was paying. Well, he said, I believe I can save you some money on pictures if we got together. And he said, it would be kind of hard to get pictures.

[fol. 1180] Q. Hard for him?

A. It would be hard for me to get pictures. And he went along and wanted to know what I wanted for a half interest. So I told him. So he didn't offer me enough

money for it and we just turned that deal down. He said, you can ask the boys that is in with Mr. Earl Hendren, what he thinks of the deal or Mr. Baird at Newport, he said they all seem satisfied with it. I told him I thought it would be if I got enough money for my part. So that was about all there was said there, between me and Mr. Sudekum.

Q. And then did you open your theatre at Harriman on or about June 17, 1938?

A. Yes sir.

Q. Then you opened a theatre at Newport on or about September 2, 1938?

A. Yes sir.

Q. The Crescent opened a theatre at Newport on or about August 30, 1938?

A. Yes sir.

Q. To your knowledge, at the time you began preparations for opening a theatre at Newport, did you begin to prepare first, or did the Crescent begin preparations first, if you know?

A. Well, I believe I began to start work first, but they beat me to the draw; they opened theirs before I did.

Q. At the time you talked with Mr. Sudekum prior to [fol. 1181] the time you opened the theatre at Harriman, did Mr. Sudekum express any opinion as to whether or not Morristown or Harriman were large enough to support two theatres?

A. Well, he said he didn't think those towns were large enough to support two theatres.

[fol. 1182] Q. At the time you opened the Palace Theatre at Morristown on or about March 26th, 1937 were you able to obtain any Paramount product?

A. Well, we got a few pictures from Paramount.

Q. Was this letter received by your office?

A. Yes sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 90.

(Letter so filed and marked.)

I don't think it is necessary to read this. Well, perhaps I had better. It is to Miss Zella Dyer, Peerless Enterprises, in Knoxville, Tennessee, dated August 14, 1937. The first paragraph; "We are enclosing confirmation of bookings

requested in your letter of August 12th for Morristown and Fountain City."

There are some other paragraphs. I am simply offering this for the purpose of showing at this time Mr. Smith was able to obtain Paramount product.

Q. Did you buy the pictures shown on this document? (Handing paper to witness.)

A. Yes sir.

Mr. Dobey: I offer this document in evidence as Government's Exhibit No. 91. It is dated August 14, 1937.

(Paper so filed and marked.)

[fol. 1183] The Court: What is that, statement of the films he bought?

Mr. Raftery: Was it two or four pictures he bought?

Mr. Dobey: It is neither two nor four.

Mr. Raftery: What is it? Will you tell us?

Mr. Dobey: Six or eight. I beg pardon; it is five pictures.

Now, at this time I would also like to offer in evidence the play-off sheets of Paramount for the 1936-1937 season. You recall he opened on March 13, 1937 and was able to obtain some Paramount product; that is, the play-off for the Crescent house at Morristown, Tennessee. This should be Government's Exhibit P-26. This Exhibit shows that of the 1936-1937 Paramount product the Crescent Princess Theatre played sixteen pictures, all of which were spot booked.

The Court: At Morristown?

Mr. Dobey: At Morristown.

[fol. 1184] Q. Did you write Paramount Pictures Corporation a letter, of which this is a photostatic copy under that date?

A. Yes sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 92.

(Letter so filed and marked.)

The Court: Can any of you gentlemen tell me if the case of Jetton vs. Warner Brothers in the District Court for

the Eastern District of Pennsylvania, whether or not that appeal has been decided?

Mr. Raftery: Yes sir, it was reversed.

Mr. Wright: It was reversed entirely on technical grounds. The merits of the case were not considered on the appeal at all.

Mr. Raftery: It was an interlocutory motion. The Court granted a temporary injunction pending the trial, it went up on appeal, reversed and sent back to be tried on the merits and the defendants in the case, the defendant exhibitors soiled everything by forming a combination and putting the competing theatres together, and everybody was happy after but the distributors.

[fol. 1185] Mr. Dobey: I will read this letter dated February 12, 1938 from Mr. Smith to Paramount Pictures Corporation:

"Please book us Mountain Music for Fountain City, Feb. 5th. and Easy Living for Mar. 10th.

"We have so much old product to play, it is impossible for us to play these up for some time, and this was our reason for asking that these be transferred to Morristown. However, you state that the other exhibitor has this product bought. We could change these for older product which he has already played in exchange for the remaining six pictures at Fountain City. You would get your money out of these sooner, and we would be getting closer to playing our newer product."

The sentence there of any importance is: "We could change these for older product which he has already played in exchange for the remaining six pictures at Fountain City."

Mr. Raftery: Well, is Fountain City involved in this litigation in any way? No.

Mr. Armistead: I think, may it please the Court, in order that this will be understandable, that that previous letter should be read. Frankly, I don't quite understand.

[fol. 1186] Mr. Dobey: We tried to find it and haven't been able to locate the previous letter. They are in that letter asking to be permitted to play some Paramount product second run in Morristown.

Mr. Waller: He bought them in the small town and wanted to play them in the large town, is that the idea?

Mr. Raftery: You see evidently there is some difference, —judging from what you just read, there were quite some differences on this town of Fountain City.

The Court: Some what?

Mr. Raftery: There are quite some *quite some* differences in Fountain City. What he is trying to do in this letter is settle some differences he has in Fountain City, Tenn. by transferring playing time of his other theatre in Morristown, something I can't quite see where it is helpful in this litigation.

Mr. Dobey: You will see just as soon as I read this letter; helpful to us, not to you.

[fol. 1187] Q. Did you receive this letter in reply?

A. Yes, sir.

Mr. Dobey: I offer this letter in evidence as Government's Exhibit No. 93.

(Letter so filed and marked).

From Paramount Pictures Distributing Company to Mr. Tim W. Smith, signed by A. H. Duren, Booking Manager.

"Dear Mr. Smith:

We have your letter of February 12, in which you request that we book Mountain Music on February 5, and Easy Living for March 10 in the Palace Theatre, Fountain City, Tennessee.

We are taking for granted that you mean March 5 on Mountain Music; however, we are unable to fill either of these dates with the pictures requested, but we are taking the liberty of booking two other features, which we trust will meet with your approval.

With reference to playing the remaining six pictures on your Mountain City contract, in Morristown, as we stated before, we will be unable to do this, since our service has been sold to another exhibitor in Morristown for both first and subsequent runs. * * *"

There is another paragraph that is immaterial.

[fol. 1188] Q. Now, you received that letter shortly after that date?

A. Yes, sir.

Q. Now, how long after you received that letter was it before the Crescent Amusement Company opened the Ritz Theatre at Morristown?

A. Well, I imagine that was around four or five months, something like that.

Mr. Dobey: Now, in order that this may be apparent to your Honor as we go along, I call your attention to the fact that the Paramount franchise was dated July 28, 1938, about four or five months after that letter was written but that it was executed on that date as of November 1, 1937, I think that the correspondence, inter-office correspondence subsequently introduced will show that during this period of time they were negotiating about the franchise.

Mr. Waller: We object to the statement of Mr. Dobey about that.

The Court: Well, he is not testifying; just pointing out the materiality of the evidence, how the evidence will be made competent in connection with other evidence, or how it will be made pertinent in connection with the other evidence.

[fol. 1189] Mr. Dobey: The franchise, it is already in evidence. The original franchise executed July 28, 1938 shows on its face that the Crescent Amusement Company was given the right to second run pictures, to exhibit the Paramount product second run when, as and if the Crescent Amusement Company ever decided to exhibit the product second run.

Mr. Waller: We object to that statement.

Mr. Raftery: I think the franchise would speak for itself.

The Court: I might say, gentlemen, that when it comes time to argue this case I am not going to limit you to thirty minutes. When the time comes you may take just as long as you want to argue this case.

[fol. 1190] Mr. Dobey: And that franchise was not modified in that respect until May 25, 1939, at which time it was stated that Mr. Sudekum was to exercise option whether he would take 90 days over the second run. At that time there was no option whatever as to whether he was going to take the second run, or give any notice as to whether he was going to take it.

At this time I would like to offer in evidence the Paramount play-off sheets for Morristown, Tennessee for 1937-1938 season with the Crescent Amusement Company, as Exhibit P. 27. (So marked by the Clerk).

Now, you recall the letter that was introduced, dated February 15, 1938, showing the product, both first and second run, Paramount, as going to Crescent Amusement Company.

Now, these play-off sheets for the 1937-1938 product show that the Crescent Amusement Company, with respect to the Princess Theater at Morristown, and also the Ritz Theater that was opened in August, 1938, about five months after that letter was written, played a total of 4 pictures of the [fol. 1191] whole season's product, second run, and the earliest date I see any picture of Paramount for the 1937-1938 season was played, second run, was September 6 and 7, 1938. (Referring to Ex. P. 27)

Now, I would like to introduce in evidence the play-off sheets of Paramount in Morristown, with respect to Ritz and Princess theaters and with respect to 1938-1939 products, as Government Exhibit No. P-28. (So marked by the Clerk)

The 1938-1939 Paramount product, the play-off sheets, Paramount, for Morristown, Tennessee, show that Crescent Amusement Company, with respect to both the Princess Theater and the Ritz, was open in August, 1938, and played a total of 10 Paramount pictures, second run.

At this time I would like to offer in evidence two contracts between Crescent Amusement Company and Paramount, both respect to the Ritz Theater at Morristown, Tennessee. Now, these contracts, dated March 30, 1939 with Crescent for the Ritz Theater at Morristown; it is called Paramount Spot Booking and Exhibition Contract—entitled that. The first one *if* for five pictures, repeat run; second run is for 5 pictures repeat run; and there is this [fol. 1192] language——

Mr. Raftery: Is there a memorandum on the back signed for Paramount? The spot booking contracts are never signed by exhibitor; it is purely an interoffice memorandum, kept in the office of the exchange for booking records. No signature on it at all.

Mr. Dobey: The Crescent Amusement Company licensed the Ritz in March, 1939, in Morristown, executed this contract.

Mr. Raftery: No signatures on it, though?

Mr. Dobey: That is correct. Now, this is the recommendation: "Where spot booking——"

Mr. Armistead: Just a minute, your Honor; we object to that.

The Court: Let me see those. (Handed to Court)

Mr. Dobey: Before you read that, your Honor, I would like to explain the purpose of it: The purpose of it is to [fol. 1193] show that under these franchise agreements the Crescent Amusement Company was permitted to spot book Paramount product, second run, when, as, and if the Crescent Amusement Company ever wanted it; that is prior to the modification of May 25, 1939; which was about a year after the franchise was allegedly entered into, and after those documents were written.

[fol. 1194] The Court: I will have to sustain the objection. These documents just do not prove themselves, you will have to introduce them by a witness, that is not signed by the Crescent Amusement Company.

Mr. Wright: That is the only record that there is, there is no other contract, and no other way to prove the contract that shows spot booking; the only memorandum.

The Court: You will have to get the witness to prove it, they object to it.

Mr. Wright: It came out of the records of that company, and it is admitted that it is the only record that the company has of the contract. I don't think a witness could in any way say more than what they are, the spot booking.

Mr. Armistead: Then put a witness on the stand; and I will clear this whole business up by asking one question.

Mr. Wright: All right.

[fol. 1195] Mr. Armistead: He is not here.

The Court: Well somebody evidently made it, made out that document in the office of the Paramount Distributing Company. I assume that person could be located to testify why he made it.

Mr. Wright: If the Court please, there may be a hundred people in the exchange who are making out different documents. I think the document having been found in the ordinary course of business, having been kept as a contract as a part of the exchange records is entitled to validity in the absence of the party who typed it out.

The Court: I assume that is true, but counsel can't just walk in and pass in letters or documents, without having them introduced by some witness. There are certain rules with respect to documents, they just don't prove themselves.

Mr. Dobey: Of course these people are co-soncpirators, and I assume some of these defendant exhibitors there, some of their documents, they handed them over to us, and we *with* to introduce them in evidence without further ado. [fol. 1196] Mr. Armistead: I didn't know there were any co-conspirators here, I didn't know there was any proof here that there were any co-conspirators here. I know that is what he is trying to prove.

The Court: As I understand the evidence, there are certain documents that are proved under certain rules of the Court, but here a request for admission has been made, and as I said, some documents by reason of their age, or some reason, prove themselves; otherwise letters and documents will have to be introduced by the testimony of the witnesses who know something about it.

Mr. Dobey:

Q. Mr. Smith, on or about October 7, 1938, did you complain to the Department of Justice with respect to the Paramount-Pictures Corporation?

A. Yes, sir.

Q. And on or about November 21, 1938, you filed suit involving Paramount pictures Corporation, claiming treble damages under the Sherman Act?

A. Yes, sir.

Q. Now after that suit was filed, I will ask you if after [fol. 1197] the suit was filed on November 21, 1938, did you receive this letter, which is dated November 17, 1938. (Passed to the witness.)

A. I believe I did. I think so.

Mr. Dobey: I offer this letter in evidence as Government's exhibit number 94.

Mr. Frolich: When did you say that suit was commenced, Mr. Dobey?

Mr. Dobey: I said the suit was filed on November 21, 1938.

Mr. Frolich: The record shows that the suit was filed by leaving copy of the complaint with the Attorney General of Tennessee, which was later transmitted to the home office of the various defendants.

This matter, Your Honor knows, that letter is dated September 17th, which was four days after the suit was filed,

and there can be no inference that the letter was sent because of the suit.

Mr. Dobey: No, I do not intend to create that inference.

The letter is after that, copy of a letter, this letter is [fol. 1198] dated November 17, 1938. That says November 21, 1938, A. M. This letter is dated November 27, 1938. There was a complaint made to the department of justice by Mr. Smith, dated October 7, 1938.

Mr. Raftery: Who are the parties to that suit, Mr. Dobey, if we might inquire?

Mr. Dobey: Columbia, Paramount Pictures.

This letter is as follows:

It is to Mr. Tim W. Smith and is signed Oscar A. Morgan, District Manager:

> "I understand from Mr. H. E. Pickett, Sales Manager of the Atlanta Office, that you advised him you were interested in securing some pictures for Morristown, Harriman, and Newport, Tennessee.
>
> "We have a substantial number of first run pictures available for your use—also, a substantial number of Short Subjects. I am, therefore, requesting Mr. House, our Branch Manager, to get in touch with you in regard to negotiating a deal for these pictures.
>
> Yours very truly."

Q. Now at a later date did Mr. House——

The Court: Who is that letter from?

[fol. 1199] Mr. Dobey: Oscar Morgan, District Manager for Paramount.

The Court: To this gentlemen. What has that got to do with the suit. I do not understand all this discussion.

Mr. Dobey: I want to show that Mr. Smith did get some Paramount product at a later date. I want to make that clear before the defendants' day.

Q. Did Mr. House call upon you some time after that letter, did you receive that letter?

A. What was his name?

The Court: House.

A. House, well it is just hard to remember one man that came there to call on me.

Mr. Dobey:

Q. Some one that called on you from Paramount?

A. Some one called on me, yes.

Q. Do you remember when?

A. I can't remember those dates.

Q. Was it after you closed your theater at Newport, September or November 19, 1938? Or was it after the letter was written?

A. I just don't remember just what that date is, what date he called on me.

[fol. 1200] Q. You re-opened your theater at Harriman on or about January 28, 1939, did you not?

A. Yes, sir,

Q. And you kept that theater open until February 10, 1940 did you not?

A. Yes, sir.

Q. And during that time were you able to obtain Paramount product?

A. I can't just say for sure on that.

Q. When you opened your Morristown, Tennessee, theater, on or about March 26, 1937, did you obtain any Warner Bros. product?

Q. At Morristown?

Q. Yes?

A. Then it seems to me like we ran some comedies, I don't think we ran any features.

Q. Did your office receive these four letters from Warner Brothers?

A. Yes, sir.

Mr. Dobey: I ask that these letters be marked for identification as Government's exhibits.

The Court: All right, mark them and submit them to counsel.

[fol. 1201] Mr. Dobey: I offer these letters in evidence.

The Court: All right.

Mr. Dobey:

Q. Now, that letter of August 19, 1937 is from D. Alterman, Branch Booker, Warner Brothers, to Miss Zella Dyer of Peerless Enterprises. (Reads Letter)

Mr. Dobey: Now, on August 23, 1937, there is a letter from D. Alterman to Miss Zella Dyer, Palace Theatre, Morristown, Tennessee.

The Court: Does that first letter refer to the Palace Theatre?

Mr. Dobey: Not up above, it does in the body, it refers to pictures for use in the Palace Theatre, Morristown, Tennessee.

(Reads Letter.)

The next is a letter of August 27, 1937 to Miss Zella Dyer, Peerless Enterprises, Knoxville Tennessee. (Reads first two paragraphs of letter) I won't read the rest if that because I don't think it is material in anyway.

Next, a letter of September 30, 1937, from Dave Alterman, Branch Booker, to Miss Zella Dyer. I will read the second paragraph. Then follow four titles.

[fol. 1202] The Court: What is the number of those Exhibits, please?

Mr. Dobey: Exhibits Nos. 95, 96, 97, and 98.

Mr. Raftery: Why clutter up the record with those letters. They are referring to short products.

Mr. Dobey: There is no dispute about short products. The point is, he couldn't get anything except comedies, he couldn't get anything else.

Mr. Raftery: The letters have reference only to short products.

Mr. Dobey: I don't think that is correct. I think there is a refusal there to sell him anything except comedies, both first and second run products.

The Court: I can't see that this evidence is material to anything, except second run comedies, because the first letter starts off: "Dear Miss Dyer: Your letters of August 18th, requesting two-reel comedies for Palace Theatre, Morristown Tennessee." All that correspondence is in connection with two-reel comedies.

Mr. Dobey: I think the next—May I see that again?

The Court: Yes. In the first letter, they said they could [fol. 1203] give him two-reel comedies, if they would take second run. In the second letter they said they had shipped him one comedy for second run but hereafter they couldn't give him anything more two-real comedies for second run, and in the third letter, they said they could. That is comedies. This letter of August 23d, 1937, they say they had confirmed and shipped second run comedy for use in Palace Theatre. However, they would be unable to supply him with any additional bookings on second run product,

inasmuch as they had received a request from the first run situation that they would be in position to use subjects for second run and had asked that they not release them for any other situation.

He didn't ask for anything but second run two-reel comedies.

Mr. Dobey:

Q. Were you endeavoring to get any second run product or third run products, aside from comedies?

A. Yes sir.

Mr. Waller: That is objected to.

The Court: Did you write that letter?

A. No. Miss Dyer wrote the letter.

[fol. 1204] Q. Did they refuse to sell you second run product, except comedies?

A. They refused to sell me any feature whatsoever.

The Court: That is all right.

Mr. Armistead: Then the letters have nothing to do with it.

Mr. Dobey: I think that second letter confirms, when they say second run product, I don't think that is certainly not clear in its face. If it is true that it refers only to comedies, I think there is more, I think that is more susceptible of interpretation, it refers to second run product which is a product of any sort.

The Court: I don't see any point to introducing these letters.

Mr. Armistead: I move to strike those letters, may it please the Court, as being immaterial.

Mr. Dobey:

Q. Did you negotiate with them and endeavor to get second run product?

A. I sure did.

The Court: Well, I think that evidence is competent. I don't see any use or any reason to put all these letters in the record.

[fol. 1205] Mr. Dobey: You disagree with me, apparently, on the interpretation of that "second run product"?

The Court: Maybe I do.

(Court Examines letters.)

Mr. Dobey: I assume that means comedies as well as pictures and features as well as comedies.

Q. Is that the way you interpreted that letter?
A. That is the way I interpreted it.

Objection by Defendants.

The Court: (Reading) "I will be unable to supply you with any additional bookings on second run product."

Apparently this correspondence is in connection with second run two-real comedies.

Mr. Dobey: Of course, I disagree with that interpretation. As far as that particular paragraph is concerned, saying "However, we won't sell you any second run product—" The witness has testified they would sell him any second run or first run or third run, wouldn't sell him any runs.

Q. They wouldn't sell you any runs, would they?
A. That is right.

The Court: That evidence is all right, but these letters [fol. 1206] are immaterial.

Mr. Dobey: My position simply is, that second run product in that letter means second run product.

The Court: I sustain the objection.

[fol. 1207] (Recess)

By Mr. Dobey:

Q. Prior to the time you opened the Palace Theatre at Newport on or about September 2nd, 1938 did you have any conversations with Mr. Randle Bryan of the Warner Brothers organization?

A. [illegible]d you say before I opened or afterwards?

Q. Before you opened.

A. Yes.

Q. When did those conversations occur and what were those conversations?

A. Well, that was about, oh, maybe thirty days before I opened the theatre. He said I could have first run up there;

told me to go ahead and make a deal for that place and he would sell me first run Warner Brothers pictures.

The Court:

Q. Who was that?
A. Mr. Randle Bryan.

By Mr. Dobey:

Q. What was his position?
A. Salesman.
Q. For whom?
A. Warner Brothers.

By the Court:

Q. At the theatre at Morristown?
A. Newport he is talking about. That is before I opened.

By Mr. Dobey:

Q. Now, did Mr. Randle Bryan leave Warner Brothers [fol. 1208] shortly after that time to your knowledge?
A. Yes sir.
Q. And did you then negotiate with someone else for Warner Brothers' product?
A. Yes sir.
Q. With whom?
A. Rudolph.
Q. When did those negotiations occur?
A. That is after we had the theatre up, after we got started with it or before we got started—I forget exactly when, whether we had it up and going or sometime between that time.
Q. Now, what was said by Mr. Rudolph with respect to Warner Brothers product, what was the conversation?
A. Well, he said he had three years product open first run in Newport and he had two years product open in Morristown and Harriman, second run, and he worked out a deal there, a contract there for me to sign, so I signed a contract and then it was rejected.
Q. Now, just a moment. Can you identify these contracts as contracts or copies of contracts there that you signed at that time?

(Handing contracts to witness.)

A. Yes sir.

Mr. Dobey: I asw these *these* contract applications be marked as Government Exhibits W-9, W-10 and W-11.

(Contracts so filed and marked.)

[fol. 1209] Will you mark these for identification as Government Exhibits Nos. 99, 100, 101 and 102?

(Contracts so marked).

I ask that this be marked for identification as Exhibit No. W-12.

Now, I offer in evidence at this time the contract applications from Warner Brothers, made out to Mr. Smith, dated August 20, 1938 at Morristown, Tennessee for both the 1938-1939 and the 1937-1938 Warner Brothers product-number of pictures offered, fifty two; number licensed; thirty six, for 1938-1939 at Morristown; for 1937-1938 at Morristown number offered sixty, number licensed twenty six. At Harriman Warner Brothers for 1938-1939—Going back to Morristown for a moment, both of those were second run at Morristown, ninety days after first run.

Now, Harriman, number of pictures offered for 1938-1939 sixty; number licensed twenty six, ninety days after first run, and for the 1937-1938 season number offered, fifty two; number licensed, thirty six, second run, ninety days after first run. That is W-10.

Now, with respect to contract application for Newport, Tennessee, Exhibit No. W-11, 1938-1939 product, first run, number of pictures offered, fifty two; number licensed fifty two. At Newport with respect to 1937-1938 product, [fol. 1210] number of pictures offered, sixty; number licensed, forty, first run, ninety days after first run.

I call your Honor's attention to the fact that at Newport, Tennessee the contract was for two years of first run product released at Morristown and Harriman contract application was for two years——

The Court: Second run, ninety days after first.

Mr. Dobey: In both cases.

The Court: I thought he said he had a three year contract there.

Mr. Dobey: No, three year——

A. Three years. One was second run at Newport, wasn't it?

The Court: Three year product open for Newport, first run; two year product at Morristown and Harriman.

A. That is what I understood it to be.

By Mr. Dobey:

Q. Now, after you executed these contracts and before you received any word from Warner Brothers——

The Court: Wait a minute. You didn't make application [fol. 1211] for contract for Newport then for other than two two years product?

A. I was thinking it was three years at Newport.

Mr. Dobey: I think he only signed application for two years. At least, that is all we——

The Court: All right.

By Mr. Dobey:

Q. Now, after you signed these applications did you endeavor to spot book any of Warner Brothers product at Newport prior to the time you heard anything from Warner Brothers?

A. Yes sir.

Q. Did you receive these three documents from Warner Brothers in response to your request?

A. Yes.

Mr. Dobey: I offer these in evidence. They are Government's Exhibits 99, 100 and 101. The first one is a telegram from R. L. McCoy, Vitagraph, to Tim Smith, dated August 30, 1938. This is marked out of order. "Unable to spotbook features Newport until contracts approved."

Telegram dated August 23, 1938 from Mr. Rudolph to [fol. 1112] Mr. Smith: "Impossible to get action deal until weekend will advise promptly."

Letter August 29th from Dave Alterman, Branch Booker, Warner Brothers, to Miss Zella Dyer, Peerless Enterprises:

"We haven't yet received approval of contracts in Morristown from our home office, so we will be unable to confirm any product in that situation until this approval is forthcoming."

And then a letter dated September 12, 1938 from Mr. McCoy to Mr. Smith:

"Wish to advise that contracts given our representative, Mr. F. H. Rudolph, for Newport, Tenn. first run, Morristown and Harriman, Tenn. second run, have been rejected by our home office.

"Mr. Rudolph will contact you in near future."

The Court: What is the number of that Exhibit, now?

Mr. Dobey: No. 102.

By the Court: Who signed that?

Mr. Dobey: The saleman, Rudolph. McCoy, I beg your pardon.

[fol. 1113] Q. Now, after you received that letter did you hear anything from Mr. Rudolph?

A. No.

Q. Did you then go down to Atlanta to see Mr. McCoy?

A. Yes sir.

Q. What was said on that occasion?

A. Well, I went in there at Warner Brothers and Mr. McCoy was sitting there at the desk and I said: "Mr. McCoy, Smith is my name from the theatre at Knoxville." And then he recognized me and I asked him what was the matter with the contract that was rejected for Newport, Harriman and Morristown, and he says: "Well, I have got to see Mr. Sudekum before I can do anything." I says: "Well, aint there anything you can give me, spot book me a picture or any old pictures to help me out?" He says: "No, not until we have a contract" and that was about all that was said, and he said: "I will let you know in about two weeks" so he never did let us know.

Q. You never heard anything further from him?

A. No sir.

By Mr. Dobey:

Now, at this time I wish to offer in evidence contract with the Newport Amusement Company as Government's Exhibit W-12, dated November 13, 1938.

(Contract so filed and marked).

[fol. 1214] Q. Now, this contract, which was dated November 13, 1938 is for first run product, 1938-1939 season at Newport. That was the product for the same season

that you had made application for at Newport first run?

A. Yes sir.

[fol. 1215] The Court: What is the number of that Exhibit?

Mr. Dobey: The number of W-12. Now, your Honor, I would like to call your attention to the differences between the contract application.

The Court: Go ahead.

Mr. Dobey: The contract application for 1938-1939, first run product, at Newport, as executed by Mr. Smith in the contract for the line of product of Warner Brothers, 1938-1939, at Newport, same season, same run, that was executed by the Newport Amusement Company. The application of Mr. Smith was, number of pictures offered, 52; number licensed, 52. The contract with Newport states: This is the last contract covering a minimum of 26 features on the 1938-1939 releases at $10.00 per subject for two days' run.

I would also like to call your Honor's attention to the difference in the rentals. As I have just indicated, this [fol. 1216] contract states it covers a minimum of 26 features out of 52 at $10.00 per subject, for two days' run.

The Court: Now, is that 52 features?

Mr. Dobey: They licensed 26 out of 52 features; that is right. Mr. Smith's application was for the entire 52. The rental on Newport, on the contract, was $10.00 for each of those 26 out of 52. On the contract application which Mr. Smith signed, the rental for the first 16, the bracket of the first 16, was a minimum guarantee of $25.00 as against 35 per cent, and in some instances 30 per cent of that. Is that gross receipts?

A. Yes, sir.

Mr. Dobey: With respect to the next 18 pictures on Mr. Smith's application, the rental agreed to be paid was $12.50. With respect to the remaining 18 pictures out of the 52 on Mr. Smith's application, the rental was $10.00—the same as the $10.00 per subject on the Newport contract, which called for 25 out of 52.

[fol. 1217] Mr. Waller: If your Honor please, at this time we properly call to your Honor's attention that the Newport Amusement Company is not a defendant in this case.

Mr. Dobey: But is half owned by the Rockwood Amusement Company—fifty per cent interest.

Mr. Wright: By the Cherokee.

Mr. Dobey: Cherokee. I beg your pardon.

Q. Now, Mr. Smith, did you try to buy any Columbia product in 1938?

A. Yes, sir.

Q. Was Crescent using Columbia product at Morristown during that time?

A. No.

Q. What efforts did you make to buy Columbia product?

A. Well, I went down there at the same time I saw Warner Brothers in September, about the 19th, I think; and I walked into Columbia's office and spoke to Mr. Anderson, and asked him if he had any product open for Newport, Harriman and Morristown.

Mr. Raftery: Who did you speak to?

[fol. 1218] A. Mr. Anderson.

Mr. Raftery: Well, of course, he is dead.

A. And he said he had three years' product open in those towns, and I told him I would like to buy it. He says, Well, I will have to see Mr. Sudekum before I can do anything about it, and he said, I will let you know next Tuesday by Mr. Wallace. So next Tuesday night Mr. Wallace came to my office; he came into my office and says, Well, Mr. Smith, I won't be able to get to you on those three years of product.

Q. Now, who is that, Mr. Wallace?

A. Mr. Wallace, yes. He says, to make a long story short, we have to have a 25 per cent profit on all the product you don't pay for the pictures until they come in; and on this last twenty-five per cent, you have to wait until the pictures are all taken out before you get that twenty-five percent. I says, Isn't that a little out of line in selling pictures? He says, Yes, but the boss says so, it is not me and don't think hard of me. I says, I won't think hard of you. And he went on away and I never did get his pictures.

Q. Now, do you know whether Crescent obtained Columbia products shortly after that, at Morristown, Harriman [fol. 1219] and Newport?

A. I don't believe they did.

Q. What years' product were you trying to get then? Was that 1937-1938 or 1938-1939 product?

A. Well, let's see; he said he had been out of those towns for three years, and that must have been old product, over two years old, and then the new product.

Q. Do you know whether Crescent bought Columbia product for 1938-1939 season?

A. I don't know whether they did or not.

Q. Did you owe Columbia anything at that time?

A. Not a thing.

Q. Now, I believe you stated that you closed your theaters at Morristown on or about December 13, 1938, and at Newport on or about November 19, 1938; why did you close those houses?

A. Well, I just couldn't get any product there, and just had to close; couldn't get enough pictures to make any money so we could stay open; and I just had to close.

Q. Now, you re-opened the Harriman Theater on January 28, 1939; why did you open on or about that date? I believe that is correct?

A. No; a theater in town burned down; and so I had a [fol. 1220] chance to go ahead and re-open that, because that would be the only theater in that town.

Q. Why did you re-open that theater?

A. Well, there was no other theater in the town, so I thought we could make a little money while there was no other theater there.

Q. Now, did you continue to operate that theater until on or about February 18, 1940?

A. Yes.

Q. And what did you do with the equipment on that date?

A. I sold it to the Crescent Amusement Company.

Q. Did you approach the Crescent Amusement Company in the first instance with respect to the sale of the equipment?

A. Yes.

Q. Is this the contract of sale that you made with the Crescent Amusement Company—a copy of it, rather?

A. Yes.

Q. I offer this in evidence as Government Exhibit No. — I ask that this be marked for identification as Government Exhibit No. 103. (So marked by the clerk.) As a part of the sales agreement, was it agreed between you and Mr. Sudekum that you were to dismiss your anti-trust suit?

[fol. 1221] A. Yes.

Q. And you did dismiss it?
A. Yes.

Mr. Armistead: When I said no objection (referring to Government Exhibit No. 103) I meant no objection by reason of the fact that the original was not produced.

The Court: This happened when?

Mr. Armistead: This happened after August, 1939.

[fol. 1222] Q. At the time——

The Court: That was the Harriman Theater you sold out to.

A. Yes, sir.

Mr. Dobey:

Q. At the time you were operating three theaters at Newport, Harriman and Morristown, did you consider that those towns were large enough to support three theaters?

A. Large enough to support three?

A. That is right?

A. No, they were not large enough to support three theaters.

Q. Were they large enough to support two?

A. Yes, I figured they would be large enough to support two theaters.

Q. Are there two theaters in operation in each one of those towns now?

A. Yes, not two of them—in two of them, and one is three.

Q. With respect to Morristown now, Newport, are both those theaters operated by the Crescent Amusement Company, and Newport amusement Company?

A. Yes.

Q. Are there two theaters operated by Crescent Amusement Company in Harriman?

A. Yes.

[fol. 1223] Cross-examination.

By Mr. Frolich:

Q. Mr. Smith, you operated the theater in Knoxville in 1932 and 1933, didn't you?

A. Yes, sir.

Q. And what was the name of that theater?

A. Well there is one, the Palace, and one the Rialto.

Q. And at the beginning of the season 1932-33, Mr. Anderson came to see you about a contract for pictures for that season, didn't he?

A. I couldn't say about that, about the date, but Mr. Anderson was up there once or twice I think.

Q. Didn't you have a talk with Mr. Anderson in Knoxville for that season about pictures for your theater?

A. I don't remember just that date, whether I did, or whether I didn't.

Q. Did you make a contract with Columbia for pictures for your theater in Knoxville for 1932-33?

A. I couldn't say whether that is the date, but I will say this, we made a contract for the Roxy.

Q. What seasons was that for?

A. I couldn't say what season that is for, I couldn't say about that.

Q. Wasn't it for 1932-33?

A. That is close to it.

[fol. 1224] Q. That was about that date?

A. Yes.

Q. And that contract was for all the Columbia pictures, wasn't it, for the current season's contract?

A. Yes, it was that contract was for a subsequent run, you say?

Q. That contract was for a subsequent run, was it?

A. No, sir, that contract, as well as I remember was to run ahead of the Knox theater at Knoxville, Tennessee.

Q. And you signed that contract?

A. I guess I did.

Q. And the contract was approved by the Columbia Pictures Corporation?

A. I couldn't say whether it was approved or not.

Q. Wasn't a copy of the contract given to you, approved, and signed and executed by the Columbia Pictures Corporation?

A. Not having the contract here, I couldn't say.

Q. It was approved by them?

A. Anyway they claim it was approved.

Q. You were sent a copy of it?

A. I couldn't say for sure.

Q. Did you or didn't you have a copy?

A. We were supposed to have a contract all right.

Q. And that you had there you got a copy of it, didn't you?

[fol. 1225] A. We got them but if we got a copy of it I don't remember.

Q. You did get a copy of it, didn't you?

A. I couldn't say whether I did or not.

Q. Will you look through the files and see whether you have a contract with Columbia?

The Court:

Q. Have you done it?

A. I don't know whether I have one approved or not, and in this it is just like I said a while ago, there was supposed to be a contract to run ahead of the Knox theater, and that was probably what Mr. Anderson was up here to see me about. So we did have the contract then once.

Mr. Frolich:

Q. Weren't you notified by the Columbia Pictures Corporation that the Columbia pictures would be available to you as and when they became available at Knoxville for that season?

A. I couldn't say for that all the way, I remember it was to run behind the Knoxville theater at Knoxville.

Q. Did you receive any notification of that fact from time to time, they were ready for you ask you?

A. I know this, they began to play the pictures in Wise theater in Knoxville, and I let Mr. Anderson know that and he came up to see me about it, and I told him, *and I told him* I was not going to play his theaters if the Knox theater was not played, and I discussed it with him.

[fol. 1226] Q. Didn't you say you were going to play the pictures under the contract?

A. I was not going to play his pictures if I didn't have a contract?

Q. Why should you play them or play any pictures, unless you had a contract for them?

A. I just said I wasn't going to say I did that.

Q. You did have a contract, and you told Anderson you would not play any of those pictures because some other theater in Knoxville was getting the same run as you were?

A. They did.

Q. The contract must have been read?

A. I remember the Knoxville Theater.

Q. There must have been some controversy between you and Mr. Anderson about the run?

A. Must have been? I wouldn't know enough to say.

Q. Didn't you threaten him with a lawsuit when he came up here?

A. He came in to see me and I told him, I would knock him out of the office, he tried to sell the pictures.

Q. Didn't you call him back, didn't you write him and tell him you were going to bring a suit against Columbia Pictures because they had an agreement to run that was against your understanding of that contract?

A. I remember I was going to sue him, that I wrote him [fol. 1227] letters, and I think you have those letters there.

Q. Didn't Anderson come to see you and you and he talked, he talked to you about the lawsuit?

A. No, I didn't talk to him about the lawsuit, I just didn't think it best, didn't think it applied to all the companies, I just let him go on.

Q. You didn't pull the companies in, didn't bring the suit?

A. No, sir.

Q. You didn't pay Columbia a penny on that contract?

A. No, sir.

Q. And you had a contract?

A. No, sir.

Q. When you came to see Mr. Anderson in 1938, in Atlanta, did'nt Anderson discuss that old situation at Knoxville with you?

A. Let's see. I brought it up to him in a friendly way and he said, no, while he remembered it like it was yesterday, and I told him I didn't hold a grouch against him, that was a business proposition.

Q. Didn't you and Anderson have a nice, friendly talk about the controversy you had way back in 1932-1933?

A. He may have said, you are getting pictures too now.

Q. My question was your best recollection as to what he did say, what he then said to you?

[fol. 1228] A. I don't remember.

Q. Don't you remember what you said to him?

A. I said mighty well he remembered what I said to him, about the controversy at Knoxville, in the office in Knoxville.

Q. When he walked into this office, that Columbia did not sell a single picture to any exhibitor for any of the theaters at Knoxville, Harriman or Morristown for this 1936-7 1937-38 season, and 1938-9?

A. He told me he had stayed out of Sudekum's chain for three years had stayed out of Sudekum's towns for three years.

Q. So you believed his word for that?

A. Sure.

Q. And you knew as a fact for those three seasons, Columbia had been selling pictures in those three towns?

A. That is what he said.

Q. Didn't Answerson tell you that the pictures for those three years, those three seasons, were available to you as first run?

A. He said after he had seen Mr. Sudekum.

Q. Did he tell you what he would have to see Sudekum for?

A. To see whether he wanted them or not.

Q. Anderson had to see Sudekum?

A. Anderson told me he had to.

[fol. 1229] Q. Anderson told you he had to see Sudekum?

A. Yes, sir.

Q. Didn't you ask to see Sudekum?

A. No, he told me what he had to see him if he wanted them.

Q. What for?

A. To see whether he wanted the pictures or not.

Q. To see whether he wanted to them—who wanted them?

A. Mr. Sudekum, he told me.

Q. You had to see Sudekum for what, and whether he wanted them?

A. To see if Sudekum wanted the pictures.

Q. He told you what?

A. He told me he had to see Sudekum, to see whether Sudekum wanted them or not, and he would let me know, that he decided he was not in the market for them.

Q. In that conversation Anderson told you he had to see Sudekum, didn't he tell you that because of the trouble you had with him away back in Knoxville, the trouble the Columbia and Mr. Anderson had had with you away back in the Knoxville set up, that you would have to pay or make a deposit to make a deal with him?

A. No, sir.

Q. Never mentioned that?

A. No, sir.

[fol. 1230] Q. Neber mentioned that?

A. No, sir.

Q. Just told you to see Sudekum?

A. Told*d* me he had to go to see Mr. Sudekum, to see if he wanted them.

Q. Mr. Anderson had to go to see Mr. Sudekum?

A. Yes, sir.

Q. I am making it as plain as I can, I want to find out whether you took his suggestion and went to see Mr. Sudekum; who was it that was to see Sudekum?

A. Mr. Anderson was to see Mr. Sudekum, to see whether he wanted to buy the pictures.

Q. In other words, it was Anderson that was supposed to see Sudekum?

A. That is right.

Q. Did you ever find out from Anderson whether he had seen Sudekum?

A. No, sir, Mr. Wallace told me.

Q. Mr. Wallace, did Wallace tell you he had seen Sudekum?

A. No, sir, he told me to come in about September.

Q. Didn't mention it?

A. No, sir.

Q. Did Wallace talk to you about you putting up the twenty-five percent?

A. He told me about whether we should go along here [fol. 1231] three years on the contract, but I would have to put up twenty-five percent, no, sir.

Q. Was anything said about that?

A. He sa-d the boss in the office wanted it.

Q. Who was the boss?

A. Anderson.

Q. You knew that well, did you have to go to see Anderson and talk to him, ask him what he wanted twenty-five persent on it for?

A. Did I ask him?

Q. Yes?

A. No.

Q. Did you have any conversation or communication with Anderson about the twenty-five per cent?

A. Not that I remember.

Q. Didn't Wallace tell you that you had to pay twenty-five percent because you were considered a bad risk, a bad account?

A. No, sir, never heard of it from anybody living. I don't owe Columbia, and didn't.

Q. You didn't consider Columbia?

A. No, sir, I considered it alike the others.

Q. But you didn't?

A. No, sir.

Q. Columbia offered you those three seasons if you would pay the twenty-five percent?

[fol. 1232] A. Yes——

Q. You were to pay the twenty-five per cent?

A. That contract if I remember, I would have taken those pictures, because I was really needing them.

Q. You knew you could get any Columbia on the basis of depositing twenty-five percent?

A. That is right.

Q. Didn't you now that they have sold down in those three towns?

A. I don't know.

Q. Weren't you interested enough to even make an inquiry as to the situation?

A. After everything is dead and gone, we tried to contact those places, we thought it was an unusual.

Q. You thought it was an unusual and extraordinary thing for Columbia to ask you to make the deposit, or Columbia asking anybody else to take their film for only twenty-five percent?

A. That is it.

Q. Never heard of it in your life?

A. No, sir.

Q. Did you ever hear of an exhibitor who took out any advance, or paid in advance for all of their contract?

A. I heard of some saying that.

Q. How is that?

A. They never asked me to pay in advance.

[fol. 1233] Q. You knew it was a matter of courtesy?

A. I don't know whether they were hard up or what was the matter about the twenty-five per cent.

Q. Who was hard up?

A. Columbia.

Q. You thought they were so hard up that they would have to get the twenty-five per cent out of you to make a deal with you?

A. Probably so.

Q. You were not hard up then, were you?

A. I didn't have anything.

Q. You didn't have anything?

A. No, sir.

[fol. 1234] Q. Have you gone to Columbia to ask for any product since that conversation in 1938?

A. I don't think I have.

Cross-examination.

By Mr. Armistead:

Q. Mr. Smith, I understood you to state that you thought that the towns of Newport, Harriman and Mirristown were large enough, each was large enough to maintain two theatres; in other words, that two theatres could be successfully operated in each of those towns, that is correct, isn't it?

A. Here is what I figured; they was big enough to operate in each of those two towns, two theatres.

Q. You said you didn't think either of those towns was big enough to maintain three theaters?

A. That is right.

Q. I wish you would explain to me why Newport, and that is applicable to the other two towns, Morristown, and Harriman, was large enough for two theatres and not three?

A. Well, it is according to the population of the towns. There isn't as much drawing power there that just would take care of three theatres.

Q. Is that the only reason?

A. There isn't enough manufactories there, not enough people working to support three.

[fol. 1235] Q. How big do you think a town should be before it would be large enough to support three theatres?

A. Well, it is according to how many manufactories in the town, it could be smaller than others.

Q. Well, give me an idea, I have no idea at all from your testimony?

A. Well, say, a town of 10,000 can, maybe, if it has got a good many manufactories there where people work on the

outside with drawing power from the outside of the city it probably could support three theatres; and, probably, a town of that size wouldn't support over two theatres.

Q. What is the population of Newport, did you say?

A. I imagine it is about 4,000, something like that.

Q. Morristown is how big?

A. Morristown, I imagine about 8,000 or 10,000.

Q. Morristown is two and a half times as large as Newport. Has Morristown any factories.

A. I beg pardon?

Q. Does Morristown have any factories in it?

A. Yes, it had; Let's see, there was a wood working plant there and a lumber yard, not very many factories.

Q. How about Newport?

A. Newport has got a canning factory, and two lumber mills.

Q. That canning factory don't run all the year around, does it?

A. I imagine it does.

[fol. 1236] Q. What do they can down there?

A. I beg pardon?

Q. What do they can down there?

A. Turnip greens, apples, tomatoes—anything that can be canned.

Q. You investigated that before you went into that town, didn't you?

A. I looked around the town before I went into it.

Q. What about Harriman; does it have any factories?

A. Yes, it has several factories.

Q. Don't you think Morristown—Well, does it have twice as many factories, for instance, as Morristown?

A. I don't know how many Morristown has got now, but it had at that time, it did have about twice as many.

Q. Harriman was a better town to support two theatres than Morristown, was it?

A. Well, it was a better show town, yes.

Q. Well, are there any other elements which enter into it besides what you have just stated.

Q. No. I believe not.

Q. Now, when was the Peerless Enterprises incorporated or chartered?

A. That is one thing I don't remember, is dates.

Q. Give me the year?

A. About 1932.

[fol. 1237] Q. In 1932?

A. I imagine pretty close to that.

Q. You say you owned 55 per cent of the stock?

A. Yes.

Q. Who were the other stockholders?

A. My wife.

Q. How much does she own?

A. I don't remember, unless I had the book to tell you.

Q. You mean, you don't know how much your wife held, of stock in a corporation in which you owned a controlling interest.

A. Not off-hand, I don't remember.

Q. Give me your best idea about it?

A. I couldn't give you an idea.

Q. Who is the other lady?

A. Miss Dyer.

Q. How much stock does she own?

A. I don't remember that.

Q. Any other stockholders?

A. That is all.

Q. So you own 55 per cent, your wife owns an unknown quantity and Miss Dyer owns the rest?

A. That is right.

Q. What is it capitalized at?

A. I think it is $10,000.00.

[fol. 1238] Q. Is the entire capital stock issued?

A. I couldn't say.

Q. You don't know, then, whether—How many shares of stock were authorized to be issued under the charter?

A. I forget.

Q. One hundred?

A. I don't remember.

Q. Fifty?

A. I don't remember.

Q. Ten?

A. I don't remember.

Q. What is—Well, you make an annual report to the State of Tennessee, don't you?

A. Yes sir.

Q. You don't know how many shares of stock are authorized under the charter?

A. No sir, I don't remember.

Q. Who keeps the books?
A. Miss Dyer.
Q. Where does she live?
A. Knoxville.
Q. Is she related to you?
A. Not a bit.
Q. How long has she been connected with the Theatre?
A. About seven or eight years.
[fol. 1239] Q. Is she connected with it now?
A. Yes.
Q. In what capacity?
A. Secretary.
Q. What is the par value of that stock?
A. I don't know much about that; I don't keep up with it so much.
Q. What did you pay for your 55 per cent of it?
A. Well, I was the starter of the enterprise.
Q. What?
A. I was the starter.
Q. I know, but you had to pay for your capital stock; what did you pay for your 55 per cent of capital stock?
A. I couldn't say.
Q. You haven't any idea?
A. No.
Q. How old are you, Mr. Smith?
A. Twenty-one.
Q. Would you mind giving me your correct age?
A. Forty-seven years old.
Q. Where is the principal office of the Peerless Enterprises?
A. Knoxville, Tennessee.
Q. How many theatres does it operate now?
A. Two.
Q. One at Fountain City?
[fol. 1240] A. And one at Knoxville.
Q. And one at Knoxville?
A. Yes.
Q. Let's get back to these Newport theatres. What caused you to go over there to look the situation over? In other words, what caused you to commence it in the opening or possibility of opening or operating a theatre in Newport, and by you I mean the Peerless Enterprises?
A. Just about the same reason, Mr. Armistead, that the Crescent Amusement wanted to get over there; it looked

like there was money in that town, like anybody could make some money, so I took a chance to go over there and see.

Q. That opportunity didn't arise all of a sudden, the situation had been there for years, hadn't it?

A. Well, I do things, lots of times, just on a sudden that way; look it over and take a chance on it.

Q. So you went in there just to take a chance?

A. Well, that is the only thing to do in business, is to take a chance.

Q. Did you discuss that with any other stockholders before you went over there?

[fol. 1241] A. I sure did.

Q. Did either of them go over there with you?

A. I couldn't recall whether they did or not. They have been to that place though.

Q. Did you buy a building over there?

A. Leased the building.

Q. From whom?

A. McNeil.

Q. What is his first name?

A. Let's see—I forget his first name.

Q. For what period did you lease the building?

A. Probably five years, as well as I remember.

Q. At what rental?

A. I believe it was $100.00 a month.

Q. Sir?

A. $100.00 a month, I think.

Q. Payable how?

A. Monthly.

Q. In advance?

A. Yes, sir.

Q. Do you know why Mr. McNeil required the payment of that rent in advance?

A. Like all other men that owns anything, it is always paid in advance.

Q. Well then, that is not applicable to the moving picture industry then, which owns the films? It doesn't require [fol. 1242] an exhibitor to pay in advance, as I understood you awhile ago in response——

A. Yes, sir, they are required to pay for the film in advance.

Q. I misunderstood you when you made answer to Mr. Frolich then. Now, there was already a new, modern, up-

to-date theatre in Newport when you entered there, namely, the Winston Theatre?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And it had more seats and was more up to date and modern in appointments than the theatre that you opened?

A. That is right.

Q. Now, was this a store building that you leased, Mr. Smith?

A. Well, it used to be a theatre building that Mr. Baird used to be in before he opened up the new theatre he has got.

Q. Now, where was that located with reference to the Baird or Winston Theatre? Was it on the same street?

A. No, it was on the next block. It was one block in an L shape, and he was on one street and I was on another one.

Q. Was Baird on the main street, that is, the Winston Theatre?

A. Well, I guess this theatre that I was in was on the main street.

Q. Were there any seats in the theatre when you opened it, I mean when you leased it?

A. I think there was an old piano in there and some beaver-board. That was all and Mr. Baird moved that out. [fol. 1243] Q. So then you had to start from the beginning and put in the seats and other equipment, did you not?

A. That is right.

Q. Now, what kind of seats did you put in? Were they cane-bottom seats or were they plush bottom seats?

A. They were plush bottom.

Q. New ones?

A. That is right.

Q. From whom did you buy them?

A. National Theatre Supply Company.

Q. Did you pay for them in cash?

A. No.

Q. On credit?

A. Yes.

Q. Title retained?

A. Yes, sir.

Q. Now then, your sound equipment, from whom did you buy that?

A. Well, let me see. I believe I had part of the sound equipment myself that I put in there; I already had it.

Q. Where had you formerly used that sound equipment, in what theatre?

A. Well, I believe I had had that several years ago in an open air show in Knoxville.

Q. In what?

[fol. 1244] A. An open air show.

Q. Well, you had had that equipment for how many years, that sound equipment?

A. Well, that sound equipment, I forget just how long I had had it.

Q. Well, approximately, how many years?

A. Well, we will say a year before I opened there; close to that time, maybe.

Q. This other equipment, where did you get that?

A. Which other equipment?

Q. You had to have something else besides sound equipment and seats, didn't you?

A. Well, we bought it from the National Theatre Supply Company, most all of it.

Q. Well, did you pay cash for it or did you buy it on time, title retained?

A. Just like I said, bought it on time.

Q. What kind of heating system did you have in the theatre?

A. Steam.

Q. Hot air—I mean one of these radiator things or was that hot air?

A. Unit heater.

Q. You mean a stove setting out in the building, in the theater part?

A. No, that means steam heat coming through a thing like a radiator, like an automobile radiator, with a fan be-

[fol. 1245] hind it to propel the air out of the unit heater.

Q. Was that located in the basement or on the same floor with the seats?

A. Well, the boiler was on the outside of the building and this unit heater was on the inside of the building and you turn on the switch and the fan goes to work and steam circulates through this radiator and heats up the building.

The Court: I suppose your cross examination will take some little time?

Mr. Armistead: Yes, sir.

The Court: All right, Adjourn court until 9:30 in the morning.

(Thereupon an adjournment was taken).

[fol. 1246] Exhibit, Correction

Warner Brothers Contract which was filed as Government's Exhibit No. L-11 to the testimony of H. T. Bailey on July 16th, 1941, should be numbered Government's Exhibit No. W-8.

[fol. 1247] VOLUME IX

Friday, July 18, 1941.

Pursuant to adjournment Court convened at nine o'clock a. m. when the following transpired:

Mr. Raftery: Your Honor please, I would like to hand up to your Honor the last decision in the motion picture case.

The Court: I will be glad to have it.

Mr. Raftery: Decided on the 24th of April, 1941. It is the case of White Bear Theatre Corporation vs. State Theatre Corporation, reported in Commerce Clearings, Federal Trade, p. 52603, paragraph or whatever it is. That was decided in the District Court in Minnesota.

I also have here the decision of Judge Otis which is referred to in the Westway case. On that I believe you have the citation. If you haven't, I will give it to you. That is reported in CCH Federal Trade Regulations service page 6442 and in this same appendix are the findings of fact and conclusions of law in the case of Huber Theatre Company vs. Metro-Goldwyn-Mayer. I also would like to give your Honor a copy of the brief filed by the appellees in the Westway Theatre case, which has practically every motion picture case that is written up in it.

[fol. 1248] The Court: Proceed with the cross examination.

Thereupon Tim W. Smith resumed the stand for further cross examination.

By Mr. Armistead

(For Crescent Amusement Company):

Q. Mr. Smith, you stated that the reason for your entry into Newport was because you thought that that town was large enough to support two theatres?

A. Yes, sir.

Q. When was the first time you went to Newport to look over the situation?

A. Well, I had went up there on several occasions, I guess, before the Crescent Amusement Company figured on going in there when Baird was up there himself, and looked at the place and it looked like there was plenty of business there.

Q. What was your purpose in going there when Mr. Baird was operating the theatre there?

A. Well, it looked like he was doing plenty of business and I just went up there—I didn't figure on putting up a theatre at that time, you see.

Q. What were you going there for?

A. Well, just to look over the town and see if it was big enough to put in two theatres.

Q. What year was that?

[fol. 1249] A. Well, I imagine that was back in about 1934 or something like that.

Q. Why didn't you open up a theatre then in Newport?

A. Well, I just didn't open it.

Q. Sir?

A. I just didn't want to open one at that time.

Q. Why not?

A. Well, I couldn't give you any reason why I didn't but I just didn't feel like I wanted to put one in there.

Q. Well, you went over there to look the situation over and see whether or not the town was big enough to support two theatres and at that time you reached the conclusion that it was large enough, did you not?

A. Well, lots of times a person will change their minds. They might think they want to go in a place and then they say, I don't believe I want to go in and not have any particular reason for not going into the place.

Q. Where were you operating a theatre in 1934?

A. Knoxville.

Q. Just had one theatre?

A. In 1934 I think I had two.

Q. In Knoxville?

A. Yes, sir.

Q. Now, why did you change your mind then?

[fol. 1250] A. Well, lots of times persons change their minds and don't know why they do change their minds.

Q. Lots of times a person does what?

The Court: Change their minds when they don't know why they do.

A. Change their minds when they don't know why they do.

By Mr. Armistead:

Q. Is that characteristic of the male sex?

A. Well, I don't know; probably so.

Q. So then you waited from 1934 until 1938 before you definitely decided to go into Newport, is that correct?

A. That is correct.

Q. Now, during that four year period did you go back over to Newport and look the situation over?

A. Well, not in particular. I would go through there and kinder stop and look it over.

Q. Where were you on your way to when you would drive through Newport?

A. Well, not any particular spot.

Q. Just driving around?

A. Just driving around.

Q. Well, for what purpose?

A. Well, just to get a little air and probably look over the scenery.

[fol. 1251] Q. Can't you get air closer to Knoxville than Newport?

A. Well, maybe it was a little different air up there.

Q. Sir?

A. A little different—people goes to the mountains sometimes to get a different—people leave Nashville and go to the Smokies.

Q. So you went over to Newport to get air?

A. In other words, I was just riding around.

Q. Who was with you?

A. Well, I just was by myself.

Q. Did you go over there to get theatrical air?

A. No, I already had that.

Q. Well, how many times between 1934 and 1938 did you go over there to Newport?

A. Well, I couldn't recall just how many times; probably three or four times, something like that.

Q. Well, when you opened up a theatre at Newport what did you say your admission price was?

A. Twenty cents, ten and twenty cents.

Q. Well, why did you make your price lower than the Winston?

A. Well, just like store; you can go in there and get steak and things and some of it is better quality stuff that you pay more for. A lot of the goods I was putting out wasn't as good as the Winston so I went down to a lower price.

Q. Now, what kind of pictures were you exhibiting in your theatre there at Newport?

A. Well, we run Westerns and some features.

[fol. 1252] Q. Your pictures for the most part were Westerns and outdoor action pictures, were they not?

A. Well, that is about all we had, yes sir.

Q. They are shown mostly in what we call B houses, is that correct?

A. Well, some B houses shows the best features.

Q. Well, this situation there in Newport, for the most part they were a different kind of pictures than were exhibited in the Winston?

A. Well, there was a whole lot worse pictures than exhibited in the Winston, probably. Is that what you mean?

Q. What?

A. There was a whole lot worse pictures than exhibited in the Winston.

[fol. 1253] Q. Now, you say that the Peerless was in a bad financial condition at that time?

A. Said what?

Q. You say the Peerless was in a bad condition financially at that time?

A. In all those towns?

Q. No, when you were in Newport?

A. No, we were going pretty good; making money.

Q. Didn't you say on direct-examination yesterday that you never had anything hardly?

A. Oh, at the last, no; that is right.

Q. I am talking about financially?

A. At the last part of my time there?

Q. During the whole of the time?

A. I had enough money to go into those towns.

Q. You did?

A. Yes.

Q. Now, we are talking about Newport. Now, what did the Peerless obligate itself to pay for the equipment that went into that theater at Newport?

A. Well, I couldn't give you a definite figure on that.

Q. Well, give me an approximate figure?

A. I will say around six or seven thousand dollars, something near about that.

[fol. 1254] Q. Six or seven thousand dollars?

A. Yes, sir.

Q. All right. Now, how much cash did you pay as the initial payment on the equipment then?

A. Well, some of it was already paid for, and on some others I paid may be twenty per cent down, something like that, or twenty-five per cent down on it.

Q. Well out of that equipment which was all paid for, what value did you place on that?

A. Well, I wouldn't know; I couldn't say exactly what value I would place on that.

Q. Sir?

A. I couldn't say exactly what value I would place on that.

Q. Well, give me the approximate amount?

A. Well, it is pretty hard for me to say just what that part of the equipment was worth.

Q. Well, haven't you any idea?

A. I could say two thousand, or I could say three thousand and probably be wrong.

Q. Well, I want to get your best estimate which would be right?

A. Well, I will say a thousand dollars.

[fol. 1255] Q. All right, sir. So that left, then, five thousand dollars, or six thousand dollars, that you had to pay for, isn't that correct, on the balance of the equipment?

A. Well, I couldn't say.

Q. Well, didn't you say a while ago that you thought that——

A. I don't know how much we valued that that I had that was paid for, you see; just like I said before; I could give it to you at a thousand dollars, I could say two thousand or three thousand; I haven't got the figures to give you a value.

Q. What became of that unpaid-for equipment?

A. It went back to the National Theater Supply Company.

Q. They got it all back, didn't they?

A. No, they didn't get it all back.

Q. Well, what part did they get back?

A. Well, I couldn't say what part they did get back; a lot of it was stolen up there.

Q. What?

A. Stolen out of the theater.

Q. When?

A. After it was closed down.

Q. Well, did you pay for that?

A. Well, I think the payment down was twenty-five per cent or whatever it was, you see.

[fol. 1256] Q. I know, but that wasn't the full price for it, and even if it was stolen you were still obligated for the balance.

A. When they took it back they didn't charge me anything for that.

Q. When they took it back they didn't charge you anything for that that was stolen?

A. Yes.

Q. Well, what was that?

A. I couldn't say, may be a fire extinguisher, something like that; I couldn't say just exactly what was stolen.

Q. You couldn't say exactly what was stolen?

A. I don't remember.

Q. Have you any idea, besides the fire extinguisher?

A. It might have been a few parts, a seat or two, or something like that.

Q. Did you ever find out who stole it?

A. Never did.

Q. Well, when the Equipment Company regained possession of the unpaid-for equipment, did it relieve you from your obligation to pay the balance of the purchase price?

A. Well, I never did get no paper or writings to that effect; never have tried to get any.

[fol. 1257] Q. I will ask you as a matter of fact if the Equipment Company didn't attach that unpaid-for equipment in that case?

A. No; I volunteered and told them they could take it.

Q. Wasn't there an attachment issued on a portion of the equipment in that Newport theater?

A. By who?

Q. I am asking you?

The Court: By anybody.

A. Oh, I believe the man that owned the building there charged them $75.00 for storage; they took the equipment

out because they had title retained on it, and they could have brought it out without paying anything, but they went ahead and paid it off, I understand.

Mr. Armistead:

Q. Who issued the attachment?

A. I believe it was O'neal.

Q. He was the owner of the building?

A. Yes, sir.

Q. You say the Peerless was obligated to pay a hundred dollars a month?

A. Yes, I think that is what it is, a hundred dollars a month.

[fol. 1258] Q. And how much did you pay Mr. O'neal? I mean the Peerless?

A. I don't remember exactly how much I did pay.

Q. Haven't you any idea?

A. No, sir.

Q. To refresh your recollection, you didn't pay but $60.00 and that is the only rent you paid during the whole time the Peerless occupied that building?

A. I couldn't say but I know I paid more than that; I don't know how much.

Q. You have no idea about it?

A. No, sir.

Q. You know you didn't pay the rent in full?

A. I know that.

Q. How much did you lack?

A. I couldn't say.

Q. How many months were you behind?

A. I couldn't tell you that.

Q. Have you any idea?

A. Well, I imagine may be I owed him around $40.00 probably.

Q. Now, let's see: Then you went in there what month?

A. Let's see: that was September; opened up in September, 1938.

[fol. 1259] Q. All right, I see. Now, you had that building remodeled at your own expense?

A. Yes.

Q. Did you pay for that?

A. Yes.

Q. Who did you pay?

A. Paid the workmen.

Q. What is his name?

A. There were several workmen; I just done the contract myself and paid them off.

Q. You paid the labor, labor bills and bills for all material in remodeling?

A. Yes, sir, all except there may be one or two we are still paying on.

Q. Now, let's find out about those; who are they?

A. Well, there is lumber companies up there, I forget their names. It seems like it was the Helen Lumber Company.

Q. What?

A. Helen Lumber Company, it seems like.

Q. How much did you owe that company?

A. I couldn't say; around forty or fifty dollars.

Q. How much did you owe that company when you closed the theater?

[fol. 1260] A. Around two hundred dollars, probably.

Q. Any other outstanding unpaid bills?

A. Another lumber company up there—I forget the name—I owed them, I think, forty-five dollars.

Q. What did you owe that company when it was closed?

A. That is what I owed when it was closed

Q. Now, when you closed the theater did you owe any of the employes there?

A. No.

Q. You had them paid in full?

A. Yes.

Q. What salary were you drawing in operating that theater?

A. Well, I didn't draw any particular salary from that theater.

Q. Well, how much did you get out of it personally?

A. I beg your pardon? What is that again?

Q. How much did you get out of it personally for operating that theater?

A. Well, I didn't get nothing out of it, just to say out of that theater; it come out of all of the theaters, you see.

Q. Well, how much of your salary or compensation was allocated to that Newport theater to be paid?

[fol. 1261] A. Well, there wasn't any stipulated amount for that place.

Mr. Dobey: May it please the Court, I object to these questions at this time; I don't see the materiality.

Mr. Armistead: I am trying to prove that he was broke, that is all; that he wasn't drawing any salary there and wasn't paying his obligations.

The Court: Well, I don't know whether you will prove that by this witness.

Mr. Armistead: I don't want to try to, your Honor.

Q. So when the Newport Theater was opened up, the corporation didn't have any amount which it was obligated to contribute to your salary, is that correct?

A. The Peerless Enterprises?

Q. Yes, sir?

A. Well, I got a set salary there of $400.00 a month out of the Peerless Enterprises.

Q. How much of that was the Newport Theater supposed to pay?

A. I couldn't say.

[fol. 1262] Q. Don't have any idea?

A. No, sir.

Q. Now, you closed that theater one Saturday night, didn't you?

A. I believe that was the night.

Q. And you moved the equipment out of there on Sunday, didn't you?

A. No, sir.

Q. When did you move it out?

A. Well, at different times.

Q. You moved some of it out on Sunday, didn't you?

A. Well, I believe I took the machines out on Sunday.

Q. Why did you take them out on Sunday?

A. I had a little time to do some work there on Sunday, instead of taking them out on Monday or Tuesday.

[fol. 1263] Q. Did you make any announcement that you were going to close that theater?

A. No, I didn't think it would have been necessary to make any announcement, because the people knew.

Q. Mr. Smith, don't you know it was closed at night?

A. At night.

Q. Did they have Sunday movies there in Newport?

A. No, sir.

Q. How would they know it was closed?

Q. Yes, and as a matter of fact it was not necessary for me to advertise that I was going to close.

Q. Now that equipment which was paid for, where was that moved to, Mr. Smith?

A. I believe I took it home.

Q. Put it in any other theater?

A. No.

Q. What did that equipment consist of?

A. It consisted of machines, rectifiers, lamps and sound equipment.

Q. Did you finally use it in some other theater, and if so where?

A. No, sir, I believe I have got that equipment laying around up in the attic now.

Q. That is where you stored it, up in your attic?

A. Yes, sir.

[fol. 1264] Q. At your home?

A. Yes, sir.

Q. Wasn't very much of it was there?

A. Well about fifteen hundred pounds probably.

Q. Now that sound equipment, the first thing, the first night you opened that theater it went bad, didn't it, didn't work properly?

A. Well I couldn't say to that now w-ether it went bad, I don't think it—I just can't recall whether it went bad or not.

Q. Well it did from time to time go bad during the time that theater was being operated?

A. It is kind of customary for it. As you now state when this is going bad, or when it is not going better, and we have Western Electric for the theaters in Knowville, and still they go bad.

Q. You were there the first night it opened, were you not?

A. Probably I was, I couldn't say for sure.

Q. Back to my question, didn't that sound equipment from time to time, while you were operating that theater go bad?

Q. Just what do you mean now by going bad?

A. Get out of fix, and did not function properly?

A. Well it is not so.

The Court: He is talking about the first night now.

[fol. 1265]. A. The first night?

The Court: Yes, sir.

A. I just don't remember whether it went bad the first night as you call it or not.

Mr. Armistead: Was there a newspaper published in Newport?

A. Yes, sir.

Q. Not but one, was there?

A. Well I believe a fellow by the name of Campbell or McCampbell ran a paper there, I don't believe there was but one, I couldn't say.

Q. Now after that theater closed, there was a notice in the newspaper at Newport of its closing, was there not?

A. Yes, sir.

Q. And I will ask you if that notice did not read as follows:

"Peerless Theater Closes After Short Run Here. New play house, getting off to a bad start, was never able to obtain a foothold. Part of Equipment taken to Morristown —Other property is left in Main Street Building.

"Local people were surprised on Sunday afternoon when Tim W. Smith, Knokville theatre operator and owner of [fol. 1266] the new Palace Theatre here, came to Newport and closed out the show. The Palace opened only a few months ago in the O'Neil building, formerly occupied by the May Theatre.

"For various reasons the Palace did not receive the patronage expected and it was rumored for days that the play house would be closed. The projectors and sound equipment of the local theatre were taken to the Palace Theatre in Morristown, another Peerless Enterprise theatre. Other equipment was left in the Main Street building, and yesterday creditors had an attachment issued against it, but it was learned that Smith had not paid for it and that likely the owners would come here to reclaim the property.

"Mr. May, who was sent here recently as manager; Max Hendrick, projectionist; Miss Kay Dickerson, Cashier, and Lacy Hale, Usher, were left without jobs by the closing of the theatre. Mr. May returned to his home in Knoxville today. Mr. Headrick is still in Newport, and will probably be employed by another theatre here. Hale has

taken a job at Miunis Drug Co., while Miss Dickerson is continuing her studies at Central High School. Mr. Hale and Miss Dickerson were local residents.

[fol. 1267] "The Palace got away to a bad start on opening night. The sound equipment was poor, and the large crowd who had gathered for the opening performance went away without seeing the show. With two other theatres already in operation it apparently was impossible for the Palace to get a foothold. Overhead and operating expenses were said to be quite large, and the attendance at the shows did not justify its continuance, it was said."

You read that, didn't you?

A. I never did see it, I had the paper in my pocket yesterday but I changed and left it out, I couldn't say which way it was but I claim that line where they said I had closed it and had taken the sound equipment to Morristown, but I don't think that was it, somebody wrote that up, put a good deal more to it than I did.

Mr. Armistead: Crescent offers this in evidence as exhibit number blank, and we will prove later on.

Mr. Dobey: We object to the introduction of this.

The Court: Sustained, you can ask him whether any part of that or all of it is true, and you can ask those quetions.

[fol. 1268] Mr. Armistead:

Q. Well, is this notice true?

A. Well taking those machines out, that is true, I took them out on Sunday I believe they said.

Q. Anything else there true?

A. We couldn't make it after this other theater opened up and it says that interfered, that is true.

Q. Anything else in that in any other portion that is true?

A. Read it over again, if you want to.

Q. I will let you, I will give it to you and let you read it, I don't want to encumber the record.

The Court: If you wish to have the exhibit marked for identification so as to note it, but it is ruled out.

Mr. Armistead: The objection is well taken I admit, but I will ask that it be marked.

The Court: All right.

Mr. Armistead:

Q. Now since you have read that, Mr. Smith—and by the way, Your Honor, we desire to get that identified as the proper exhibit number.

The Clerk: That is exhibit 46.

[fol. 1269] The Court: All right, let it be identified, and the objection to offering it in evidence, let it be sustained.

Mr. Armistead: Now having read that newspaper again, are there any other statements in there that are true besides those you have mentioned?

A. Well about taking the equipment to Morristown, I didn't take the equipment to Morristown, I took the equipment home as far as that is concerned, I am sure I took it home, because I had machines already in Morristown, I didn't need any machines there, if I did I didn't put them in operation there at Morristown.

Q. With that exception then that article is correct, is it not?

A. Well there is some of it about the people were surprised at this, to see this theater closed, and then state they were expecting it when it happened, you would not be surprized if you were expecting it to close, that is not true.

Q. Anything else in there which is not true?

A. Well I just couldn't say.

[fol. 1270] A. Is there anything in there you want me to say that is true but what I have already said?

Q. No, I just asked you what was true?

Mr. Dobey: You can ask him about specific sentences.

A. Anything you want to ask me about them, if you will just ask me, I will answer it.

Mr. Armistead:

Q. All right, just point out anything in there that isn't true, besides what you have already said?

A. You ask me the questions.

Q. No.

A. You ask me the questions and I will answer it.

Mr. Armistead: I think I have the right to ask the question that way. He has read the article and I have asked him to point out those things in it which are not true.

The Court: Yes, Let him see the article and say which parts are not true.

A. I don't know whether those are true or not.

Mr. Dobey: I think the witness should be handed the article and let him point out, sentence by sentence, anything that is not true.

The Court: All right, let him have the document. Take them up one at a time.

[fol. 1271] A. (Examining the article.) As to the creditors attaching the equipment, where it says "creditors", I don't think there was but one creditor that attached and that was O'Neil. It reads like it belonged to him, but it belonged to the National Theatre Supply Company, they got the equipment back. "The Palace Theatre got off to a bad start on the opening night." I can't remember whether we had any trouble on the opening night or not. Well, we could say—I just couldn't come out and say whether these are exact true words to these facts or not, but I will say it is pretty well true, all of that, because we did have trouble with the machine there, but I couldn't say on the first night of the show.

Q. Now, Mr. Smith, you have been living in East Tennessee practically all of your life, haven't you?

A. Yes sir.

Q. You were familiar more or less with other towns in East Tennessee, besides Newport?

A. Yes.

Q. And you were familiar with towns about the size of Newport in East Tennessee in which there was located only one theatre?

A. Yes sir.

Q. Well, did you go around to any of those other towns and look the situation over to see about putting in another theatre?

A. Well, I went to Harriman and looked at that.

[fol. 1272] Q. And you looked at Morristown?

A. Morristown and Harriman.

Q. Besides those two, now, did you look at any other towns?

A. Well, not in Tennessee. I went around to Harlan, Kentucky and looked at that place.

Q. I mean in Tennessee?

A. I went to Murfreesboro.

Q. Murfreesboro?

A. Yes.

Q. Any other place?

A. I guess that is about all.

Q. Was there any particular reason for you to go to those towns that you have mentioned, because the Crescent Amusement Company, or some corporation directly or indirectly affiliated or connected with it was operating a theater in those towns?

A. Have I what?

Q. Was there any particular reason—I will put it this way: Why was it you picked out those towns in which you knew the Crescent Amusement Company, or one of the corporations directly or indirectly affiliated with it, was operating a theatre?

A. Well, those towns was pretty close to Knoxville and I just kind of watched them and seen they were doing business there and I noticed the Cherokee Amusement Company, it looked like they thought it was a good town and while there wasn't but one theatre in the town it looked like there would be room in that town for two or more, [fol. 1273] and fellows that worked around there told me they was doing a big business there, people stood out there, they couldn't get in the theatre and it looked like there was room for another theatre.

Q. What about the other towns in which Crescent and Cherokee was not operating, in East Tennessee?

A. Those towns are so little I didn't believe they would be much good or they would have a theatre in that town.

Q. Do you mean there were not towns in East Tennessee, practically the same size as Harriman, Morristown and Newport, no other towns?

A. There might have been, but may be I didn't go to those towns.

Q. Why didn't you go to those towns?

A. Probably I didn't know where they were at.

Q. You what?

A. Probably I didn't know where they was at.

Q. I thought you said you had been living in East Tennessee and were familiar with the towns?

A. I am with several towns in East Tennessee.

Q. Name some town about the size of Newport?

A. Maryville.

Q. Why didn't you go there, then?

A. They had two theatres in it.

Q. All right, name another one?

[fol. 1274] A. Lenoir City.

Q. Why didn't you go there?

A. George Denton had one, they had two theatres, and somebody else had another one there at the time I was speaking of, and I didn't want to go in there.

Q. Any other towns?

A. I went into Loudon but I didn't do any good there, it was too small, nobody had made any money, it is too small a town.

Q. How big a town is Loudon?

A. I imagine about 2500 people.

Q. When did you go into that town?

A. I forget the date; around 1932, maybe, close to that.

Q. Between 1934 and 1938, did you go to any other towns around there to see about starting a theatre?

A. Well, I have looked at several towns but I never did feel like I would want to go into them.

Q. What towns?

A. That was after I went into Morristown and of course I knew there was no use to go into another town.

Q. When was it you looked at Murfreesboro?

A. That is when I was putting a theatre in Harriman.

Q. Why did you go down to Murfreesboro? That isn't close by.

A. It didn't make much difference whether it was close [fol. 1275] or not, for you can run it off pretty quick; it looked like a pretty good town.

Q. Why didn't you go to Murfreesboro and open a theatre there?

A. I beg pardon?

Q. Why didn't you go to Murfreesboro and open a theatre there?

A. Well, I got ready to go into Murfreesboro and found out all the pictures were sold so I wouldn't get any pictures there and it was not use going in there.

Q. What year was that?

A. That was about 1938.

Q. What time in 1938?

A. I couldn't say just about the time. I had the palace going at Harriman.

Q. You were expending rather rapidly in 1938, were you not?

A. I was going a pretty good gait.

Q. Your expansion was limited, your actual expansion and prospective expansion was limited to towns in which the Crescent Amusement Company, or one of its affiliates, had a theatre?

A. It seemed like it had to be that way, that they went in towns only that was any good or they wouldn't have any theatre in there.

Q. Why do you say that?

A. Other towns are all too small, or something, or there wouldn't be no work there, maybe a bunch of farmers that never go to a show or anything.

[fol. 1276] Q. What kind of house was that you were going to put up in Murfreesboro?

A. I didn't get that far along with it to say what kind I was going to put up.

Q. I thought you said it wouldn't do any good to go into Murfreesboro because all the product was sold—sewed: how did you know that?

A. I knew it was sewed up in all the rest of the towns.

Q. How do you know that?

A. I knew I couldn't get pictures, in towns they were in.

Q. What picture producing company or distributor did you consult with to try to get films for Murfreesboro?

A. None.

[fol. 1277] Q. You made the statement awhile ago that the Crescent or one of its affiliates was in every town in Tennessee.

A. I didn't say every town in Tennessee. I said every town in Tennessee which would look like it would be a profitable proposition for a man to go into.

Q. You didn't give me a chance to finish my question.

A. I beg your pardon.

Q. I was going to add to it, Mr. Smith. I want to ask you, do you know how many theatres the Crescent Amusement Company operates, and the Strand Enterprises, Nu Strans, Rockwood, Cumberland Amusement Company, and the Newport and the Ruffin Amusement Company——

The Court: And the Cherokee.

By Mr. Armistead:

Q. The Cherokee Company and what is that one up here—Midstate, operate in the State of Tennessee?

A. No sir, I couldn't say but Mr. Sudekum told me, I think, as well as I remember, he had a hundred and fifty three theatres when I was in his office talking to him. Now, I don't know whether he included those, all his enterprises in that or not.

Q. I am talking about Tennessee. How many theatres in Tennessee now? You made the statement awhile ago and I want to show what you base that on.

A. Well, what I am basing that on, like if I was to go into a town where there was no theatre, it was just the same as putting up a place on a piece of farm land because [fol. 1278] I wouldn't do no good, and if I went in a town where there is a theatre now it would be where the Crescent Amusement Company or one of these corporations you called here or Schine or some place like that and I would be up against a proposition, up against a stone wall and where I wouldn't have any chance.

Q. How many independent theatres are being operated in the State of Tennessee?

A. I don't know. I haven't counted them.

Q. You have no idea?

A. No.

Q. Why then did you make that statement that you made awhile ago that Crescent was in every town, it or one of its affiliates was in every town in Tennessee where it looked like there was any chance of operating a theatre successfully?

A. Well, from reading the papers.

Q. What papers?

A. The News Sentinel and first one paper and another, it looks like they own everything.

Q. All right, now, just name one instance in the newspapers that you refer to where there was any article or any discussion of that.

A. Well, I don't remember just what paper it would be in.

Q. Well, tell me what year.

A. I couldn't say that. And it looks like from the lawsuits that has been around here, it looks like they are [fol. 1279] in nearly every town in East Tennessee and Kentucky.

Q. What lawsuits around here?

A. This one.

Q. So then you are basing your opinion on what you have heard around here?

A. Yes and what I have heard other exhibitors say.

Q. What other exhibitors?

The Court: Well, I don't think there is any use of going into that question again.

By Mr. Armistead:

Q. Now, who was financing Peerless Enterprises during this period of 1934 to 1938 and 1939?

A. Peerless Enterprises itself.

Q. Are there any judgments, unpaid judgments against Peerless Enterprises?

A. Well, I couldn't say whether there are or not.

Q. You are president of the corporation and don't know whether there are any judgments against you?

A. Well, I don't think there are.

Q. Well, hasn't Peerless been sued from time to time during this period for not paying its obligations, is that correct?

A. Well, I couldn't say just when they had been sued and when they hadn't been sued.

Q. Sir?

A. Or if they have ever been sued.

[fol. 1280] Q. You don't know whether Peerless Enterprises have ever been sued?

A. I couldn't say off-hand right now, no, sir, whether they have ever been sued or not. I know Tim W. Smith has been sued.

Q. I am talking about Peerless Enterprises. Tim W. Smith, as far as he is concerned, he went into bankruptcy in 1926, didn't he?

A. I think so.

Q. Have you done it again?

A. Not yet; successful so far.

Q. Sir?

A. Successful so far.

Q. Now, Mr. Smith, when you closed that theatre at Newport, Tennessee you were under contract to exhibit a number of pictures, were you not?

A. Well, there wasn't so very many pictures because I couldn't get many.

Q. We will get to that a little later. Well, those pictures that you were under contract to exhibit and didn't exhibit, you were obligated to pay for them, were you not? And by you I mean Peerless?

A. They never did hold anybody to a contract like that.

Q. I didn't ask you that, Sir.

A. I don't think a man would be obligated to pay a contract when he is out of doors, no.

[fol. 1281] Q. You don't.

A. No.

Q. Now, let me see if I get that right.

A. All right.

Q. It is your idea that you can go and make a contract with any of these eight distributors named in this complaint and if you want to go out of business—make a contract with them to exhibit or purchase forty or fifty pictures and if you have only exhibited four or five of them and decide to go out of business, it is your idea and has been your idea all along that you can just quit and there would be no obligation on your part to pay the rentals called for in the contract?

A. Well, in case I would go out of business myself just willingly, there may be something there, but you take a house, you are running a house and you buy for the Palace Theatre at Newport, for this particular house, and then something comes, a storm comes along and wipes this house out and you have got no place to exhibit these pictures, do you think the distributor would hold you to that contract with no place to play them? I will say no.

Q. I will answer that by saying, suppose the storm, suppose that theatre is not done away with by an act of God of the public enemy, do you then consider that you are not responsible for the carrying out of this contract and pay for the rental?

A. Well now, the public enemy——

[fol. 1282] The Court: Well, let's don't go into that. You are covering enough territory in this lawsuit.

A. You are getting kinder in war times.

By Mr. Armistead:

Q. Now, I believe on yesterday in your direct examination you said that you opened a theatre in Harriman, Tennessee and then you closed that theatre?

A. Yes, sir.

Q. And then later on you re-opened the theatre?

A. Yes, sir.

Q. Why did you close that theatre in Harriman the first time, Mr. Smith?

A. The first time I closed it?

Q. Yes, sir.

A. Well, we wasn't doing so well there; we couldn't get pictures like we wanted and we thought we had just better close it.

Q. Now, why was it you re-opened then?

A. Well, the Crescent Amusement Company house burned down and we begun a theatre in the——

Q. Sir?

A. I say the Crescent Amusement Company house burned down and, of course, that left our theatre the only theatre in the town and we opened back there. We knowed the people would come to see some kind of pictures anyhow for [fol. 1283] amusement.

Q. So then when the Crescent Amusement house burned down you came in?

A. Yes, sir, directly.

Q. Now, you knew the Crescent Amusement Company was going to continue to operate a theatre, did you not?

A. Well, not while it was burned down, I knowed they wasn't.

Q. Don't you know they rented another building immediately?

A. They tried to rent my building and they wouldn't give me enough for it and I went ahead and opened it myself and then they got a little house up the street and started up.

Q. The Crescent Amusement Company in about thirty days after the fire started remodelling this first theatre it had there?

A. I don't think it was thirty days. I think it was longer than that before they started remodelling.

Q. Anyhow, they started remodelling.

A. Yes, sir.

Q. And put up a great big, nice, modern theatre?

A. A nice theatre.

Q. And so Crescent had two houses there?

A. That is right.

Q. One you call a class A theatre and another one you call a class B theatre?

A. Well, I guess that would probably be what you would call it.

[fol. 1284] Q. This second theatre then was the same class as yours?

A. No, it wasn't hardly as good. It wasn't as big a theatre.

Q. Well, it showed the same kind of Western and outdoor pictures that you did, didn't it?

A. No, they showed better pictures than me because they had the pick of the pictures.

Q. You showed Western pictures and action pictures, did you not?

A. Well, we showed Western pictures and some action pictures and the pictures that we showed there wasn't the pictures that we would want to run at all, if we could get any other pictures, you see.

Q. And your admission price in that theatre wasn't as high as the admission price in this first class theatre that Crescent had there?

A. It was about five cents difference in the admission prices.

Q. Now, you said in 1938, on your direct examination, that Mr. Sudekum told you, in substance, that you would have a hard time getting pictures. That statement was made in connection with what town, now?

A. Well, I don't know what town he was referring to. He told me in all of them he could save me money probably, and he asked me what I was paying for pictures. That is at his office over the Fifth Avenue Theatre or in the building next to it somewhere.

[fol. 1285] Q. What year did that conversation occur.

A. In 1938.

Q. What month?

A. Well, I couldn't say what month it was.

Q. Have you any idea?

A. No. It was in the spring or summer, I couldn't say when.

Q. Now, you also made the statement that Mr. Sudekum told you he didn't think Morristown and Harriman were large enough for two theatres, and you made the statement

that you were of the contrary opinion. Now, how long have you been in the theatre business, motion picture business?

A. Oh, about fifteen years.

Q. Do you know how long Mr. Sudekum has been in that business?

A. No, sir, I never did ask him how long he has been in it but I guess he has been in it longer than I have.

Q. You know he is one of the pioneers in the moving picture business in the State of Tennessee?

A. Well; from the way he talked to me he seemed like he is.

Q. That is the reputation he has?

A. Yes, sir, he has been in the business a long time.

Q. Mr. Smith, do you remember when you opened your Morristown theatre?

A. Yes, sir.

[fol. 1286] Q. Didn't Mr. Earl Hendron come through there about that time and have a talk with you?

A. Well, I don't remember whether Earl came through there. It seems like a fellow working for Earl came through there or maybe Earl did come though there. I couldn't say for sure.

[fol. 1287] Q. Didn't at that time you tell Earl Hendren, in substance, that if Mr. Sudekum would pay you twenty-five thousand dollars that you would get out of Morristown, Harriman and Murfreesboro and other towns?

A. I don't remember it.

Q. You don't deny telling him that, do you?

A. Well, I don't remember it; I couldn't deny it if I don't remember it.

Q. You know Mr. Bevel, who was manager for the Crescent at Harriman, Tennessee, do you not?

A. Yes, sir.

Q. I will ask you if you didn't tell him that you could get all the pictures you needed but you couldn't get the pictures you wanted?

A. I don't think I ever told Mr. Bevel that.

Q. Now, let's get down to this picture business: On yesterday you said that you couldn't get the product and that is the reason you had to close the Harriman theater in 1938 and the Newport Theater in the same year; you remember making that statement, don't you?

A. Yes, sir.

Q. Now, you remember that Columbia did offer you its product, don't you?

A. Well, Columbia offered it to me in a way that I [fol. 1288] couldn't take the Columbia, you see.

Q. I am speaking of at that time?

A. I didn't consider that an offer; that was a hold-up.

Q. Sir?

A. That would be a hold-up.

Q. Now, I will ask you: Let's take this Newport situation—If on October 15, 1938, if you didn't make a deal with RKO for 32 pictures of the 1937-1938 product for Newport?

A. Well, probably I did; I couldn't say just what date it was.

Q. And that none of those pictures were played by you?

A. Was the theater closed at that time, then?

Q. You know when you closed it; you said you closed it in November because you couldn't get pictures; now, here is where you got a contract for 32 pictures for the 1937-1938 product?

A. Well, that could happen; we could run for may be a month and have other pictures booked in there and we didn't want to cancel pictures out to play RKO.

Q. What other pictures did you have booked?

A. I couldn't tell you; I haven't the booking sheet here with me.

Q. From what companies, what distributors?

[fol. 1289] A. Well, I amagine from Affiliated Producers.

Q. Is that all you had available?

A. We probably had pictures from United Artists.

Q. How many?

A. Well, it was a full contract; I don't remember how many pictures we stood for that year.

Q. Now then, 32 pictures from RKO, and United Artists for its entire product. Now, let's get to Metro, and Loew's

The Court: Q. Did you have a contract with United Artists for that year for its entire product?

A. Yes, sir.

Q. All right.

Mr. Armistead: Q. I will ask you if on October 14, 1938, if you didn't make a deal for Newport with Loews for the entire 1937-1938 product?

A. Well, I just don't remember whether I was dealing with them or not; I haven't got the contract with me.

Mr. Armistead: May it please the Court, these questions that I am asking him now, are based upon answer No. 12 made by RKO, Metro, Loews, which shows that RKO made [fol. 1290] the contract with Peerless for 32 pictures for the 1937-1938 product for Newport, and that they made a deal with Peerless at Newport for the entire 1937-1938 product.

Q. Now, I will ask you, Mr. Smith, if it is not a fact that you only played or exhibited four of those Loews pictures?

A. Well, I don't guess I had time to exhibit more than that for the length of time I was in business.

Q. But you said, as I caught it, that you didn't have enough product, and that is the reason you closed. Now, you have got United Artists, you have got RKO and you have got Loews, all for Newport. Now, how many more was it necessary for you to have to properly operate that theater?

A. Well, it takes more pictures; say when we pick RKO, may be there would be only four pictures that would "click", that would make any money; may be there would be five.

Q. My attention has been called to the fact that although you had a contract for the RKO 1937-1938 product and that you didn't play a single picture, nevertheless you had spot booked four pictures from the previous season's contract from RKO. Now, why did you do that?

A. If you can tell me the title of these pictures, I can tell you why.

[fol. 1291] Q. No, I haven't the title.

A. Well, may be those pictures were spot booked in and may be the others wasn't available.

Q. These pictures, the spot booking of the four pictures cost $60.00; does that help you?

A. Well, may be those other pictures wasn't available that you were talking about there.

Q. Well, assuming that they were available, why didn't you accept them?

A. I couldn't go back and see whether they were available or not, I couldn't say why I didn't. If you could tell me they were available, then I could tell you why.

Q. Assuming the product was available for exhibition, why didn't you exhibit them?

A. They must not have been available.

The Court: Were they available?

Mr. Armistead: Yes, sir, they were available, and so were Loews available.

Q. Now, let's pass to Harriman; on October 15, 1938, RKO sold Peerless Enterprises for Harriman, Tennessee, 32 pictures out of the 1937-1938 product, and you only played seven but you also spot booked 18 pictures. Now, that showed that you had that RKO product there for Har-

[fol. 1292] riman, does it not?

A. Yes, sir.

The Court: How many pictures from RKO?

Mr. Armistead: Thirty-two pictures.

The Court: 1937-1938 product?

Mr. Armistead: 1937-1938 product, your Honor. He played 9 instead of 7.

The Court: Played any spot booked, how many?

Mr. Armistead: Eighteen.

The Court: Of the previous season?

Mr. Armistead: The same season, your Honor.

The Court: Outside of the 32?

[fol. 1293] Mr. Armistead: Outside of the 32. In other words, there were 50 pictures which were available for him from RKO.

Q. Now, we come to Loews: On June 29, 1937, Loews made a deal for Harriman, Tennessee with Peerless for the entire 1937-1938 product; do you remember that?

A. I guess we made a contract with them.

Q. And only 22 pictures out of that product were played, do you remember that?

A. Well, I couldn't recall how many pictures we played.

Q. Well, you know you didn't play out the entire contract, don't you?

A. Probably we didn't.

The Court: How many pictures were in the entire contract; does it show?

Mr. Armistead: It doesn't show in that answer but it is usually 52.

Q. Now, in that same season didn't you buy two re-issues from Loews which you cancelled?

A. Well, I couldn't recall whether I did or not.

Q. Well now, in addition to having—By the way, you had Columbia available, if you had been willing to pay the prices, for Harriman, did you not, for the 1937-1938 season? [fol. 1294] A. Well, if I had been able to pay about two thousand dollars, it might have been available.

Q. I say, if you met their terms it would have been available?

A. Well, I didn't want to be hijacked on them.

Q. I didn't ask you that, Mr. Smith.

A. Well, I don't know whether they would have let me have them if I had paid for them.

Q. Well, I thought you said yesterday the reason you didn't negotiate with Columbia was because you couldn't meet their terms?

A. I was unwilling to buy because I was unwilling to meet the terms.

Q. Aside from the RKO, didn't you get pictures from independent producers?

A. Yes, we got some. I could have gotten United Artists in Harriman.

Q. Then you got pictures from United Artists, too?

A. Yes.

Q. Now, let's see: there is RKO, Loews, Columbia, United Artists and independents; five different products available for Newport and Harriman, is that correct?

A. Just about, yes, sir.

Q. Now, on yesterday you testified that you tried to get [fol. 1295] some second runs from Paramount, and you introduced in evidence a letter from Mr. Oscar Morgan of November 17, 1938, in which Mr. Morgan says that Mr. House—I forget his initials—would come around to see you. Now, House did come around to see you, as I understand you testified yesterday, is that correct?

A. Yes, sir.

Q. Now, you were not questioned about your interview with House—Now, these are second run pictures, now, I am speaking now of Paramount. I will ask you if Mr. House didn't offer you second run pictures for Harriman, Morristown and Newport?

A. Well, let's see: that is Paramount, you say?

Q. Yes, sir.

A. Well, Paramount, we bought some pictures from them, second run, but after that time we were never able to buy any pictures from them.

Q. You never did ask them, did you?

A. Yes, we asked them.

Q. I will ask you if House didn't offer to sell you certain second run Paramount pictures, 58 for Morristown, 50 for Harriman and 55 for Newport?

A. I don't think so.

Q. Do you deny that?

[fol. 1296] A. Yes, sir, I think I deny that.

Q. Well, let me read you a few of these pictures and see if this don't help you—I am not going to go into all of them, your Honor. I will ask you if House didn't offer to *see* you second run pictures for Morristown, the titles of the pictures being as follows: "My American Wife;" "I Would give my Life;", "Hollywood Boulevard;" "Go West Young Man;" now here is one: "Let's make a Million;" "Doctor's Diary;" "Make way for Tomorrow;" "Turn off the Moon." Do you remember any of those pictures?

A. Being offered to me as second run?

Q. Being offered to you as second run?

A. No, sir, I do not.

Q. Now, how about Harriman?

A. No, I don't remember them offering me anything in Harriman that way.

[fol. 1297] Q. Hadn't they offered you anything for Newport either?

A. No, sir.

Q. But you did buy some few pictures from him?

A. For Morristown.

Q. Morristown?

A. Yes, sir.

Q. Now let's get to Morristown; we have covered Newport and Harriman; I will ask you if on October fifteenth, 1938, if RKO didn't make a deal with Peerless for thirty-two pictures out of the 1937-38 product for Morristown and that only three pictures were played; do you remember that?

A. No, I don't remember how many pictures were played.

Q. You know you made a contract with them?

A. If we took the three pictures over there, if we played three pictures we probably made a contract all right.

The Court: How many pictures?

Mr. Armistead: Thirty-two and played three.

Q. I will ask you if on December 30, 1937, if Loew's didn't make a deal with Peerless for Morristown, Tennessee, for approximately thirty-two second run pictures, and that you played only sixteen pictures?

A. Probably that is right.

[fol. 1298] Q. Now you had the same contract available for you in Morristown that you had available in Harriman and Newport, didn't you?

A. Yes, all except Fox we had Fox there in Morristown.

Q. You didn't have any Newport, Harriman?

A. That is two more.

Q. That is?

A. Yes, sir.

Q. And in addition you had the independents for Morristown?

A. Yes, we had some independents.

Q. You had United Artists also in Morristown?

A. Yes.

Q. Now a letter was introduced here yesterday on your direct examination where you wrote Paramount requesting Paramount to take some of the pictures from the contract you had with Fountain City, Tennessee, and transfer them to Morristown and exhibit them up there, didn't you?

A. Yes, sir, I think I did.

Mr. Dobey: That letter was objected to and not admitted in evidence.

Mr. Armistead: A letter was admitted.

The Court: That was as I recall about a second run.

[fol. 1299] Mr. Raftery: The thing that Mr. Dobey is objecting to and has in mind, is the exhibit showing the inter-office records, they were excluded and the letter was admitted.

The Court: Look at the exhibits and see.

Gen. Ballew: They were all Warner's, I have them right here before me.

Mr. Dobey: All right, sir.

The Court: As I recall the four letters were relative to Warner Bros. second run two reel comedies.

Mr. Armistead: Yes, sir.

Q. You remember writing that letter do you not, to Paramount?

A. Yes.

Q. You had some product then at Fountain City that you could use, you were oversold, is that right?

A. No, we were not oversold at Fountain City, we figured we could play them in Morristown quicker than they would be wanted at Morristown under the contract.

Q. You thought that part of your Fountain City contract [fol. 1300] you could play at Morristown rather than at Fountain City?

A. What we were trying to do we were trying to get pictures and make something at Morristown.

Q. Fountain City is how big a place?

A. I imagine Fountain City, it is one of the biggest cities in the United States, unincorporated, around ten thousand or twelve thousand, probably.

Q. You say it is unincorporated?

A. Yes, sir, it is the largest unincorporated city in the United States, it was a while back, unless some other city has got ahead of it.

Q. How close to Knoxville is it?

A. Well the corporation lines are in two miles of Fountain City.

Q. How close to Morristown?

A. Forty-two miles—forty-five.

Q. Now let's get to the sale of this theater at Harriman Tennessee, to Crescent, February, 1940, according to these exhibits that were put in here yesterday; on your direct testimony; you were renting an old store building there from a fellow named Roberts, or what is that gentleman's name?

A. Roberts, that is right.

Q. You converted that into this theater?

A. Yes, sir.

Q. When you sold to Crescent you had a lease on that [fol. 1301] building?

A. Yes, sir.

Q. And Crescent did not take over that lease?

A. No, sir.

Q. You obligated yourself to convert that building into a storehouse, didn't you?

A. That is right.

Q. And that is what you did?

A. Yes, sir.

Q. And you further obligated yourself to pay that rent?
A. Yes, sir.

Q. To continue paying that rent?
A. Yes, sir.

Q. And you failed to do that, didn't you?
A. Well it was not on my part I failed to do it.

Q. Whose?

A. It was on Roberts' part that I was to remodel it, remodel that building where I had to carry out a contract, where they suggested to come in, and they were to remodel it and instal a bowling alley, and I had to leave the place where the stage went in, and when they came back with the figures, and I went over the figures and it was changed because to put a bowling alley in there, Mr. Roberts said I couldn't go ahead for this is where I couldn't move this stage out.

Q. You still were not paying the rent?
[fol. 1302] A. Yes.

Q. You didn't pay it?

A. I haven't paid it yes, he didn't carry out the lease and I sued him for five thousand dollars.

Q. Now then somebody else moved into that building and opened up a theater, and is operating now?
A. Yes.

Q. There are three theaters in Harriman now?
A. Three theaters.

Q. Now, Mr. Smith, yesterday you testified somet-ing about the F.B.I., Mr. Arnold's office I believe, communicating with it; when was the first time you communicated with Mr. Arnold's office?

A. Well I just forget the date there, I think Mr. Dobey can give you the date on it he has all the papers probably, when I went to Washington.

Q. Oh, you went to Washington?
A. Yes, sir.

Q. I will ask you if on September 22, 1938, if you didn't write Congressman J. Will Taylor and made a complaint that you could not get pictures for your theaters in Morristown, Newport and Harriman, Tennessee, you couldn't get sufficient product?

A. Well I don't think I wrote him, I went down and talked to him in regard to it, and then may be he might

[fol. 1303] have told me to write him a letter, and probably I wrote him a letter after that.

Q. Where did you say, when did you say you talked to him, and where abouts?

A. He was in Knoxville, in his office.

Q. You did complain that you could not get sufficient product for those three theaters?

A. That is right, yes, sir.

Q. Now I want to ask you when you had that interview with Mr. Taylor, if you told him you had a contract with RKO and that you had a contract with Loews and you had a contract with United Artists and with Columbia, they offered you its pictures, and if you were getting pictures from independents, and getting some second run pictures from Paramount; did you tell him that?

A. No, I didn't tell him that.

Q. Why didn't you tell him that?

A. Because I don't believe all those pictures you named ever were offered.

Q. You bought them in October?

A. With a deal not at all a thing like that, we were not getting pictures that we could run and make any money.

Q. Ah: you say they were not what you could run and enable you to make money with them?

A. That is right.

[fol. 1304] Q. Now I will ask you if what is your complaint about it, what is your complaint about the quality of Loew's product and RKO product?

Q. RKO and Loew's, what is my complaint?

Q. Yes, about the product.

A. Well the product, if it be on a fair proposition—you mean now for me to explain to you about that?

Q. Yes?

A. Well say there are 800 pictures made by the movin/ picture companies in the United States, and one theater might probably play three hundred pictures, so you see it is this way when you come into a town w-th three play two hundred apiece and that would be six hundred, that would be about three hundred pictures unprovided for, so you se- we don't get such a contract. We may never get it, just like Warner Bros. and Columbia would never get the pictures.

Q. I will ask you, Mr. Smith, you have been in the moving picture business for a good number of years, if it is not generally recognized that Loews makes the best pictures?

A. Well in some houses you can, then again in some other houses you can't do anything with them.

Q. I want you to answer the question?

A. Well this year I believe Paramount had the best pictures.

Q. I am talking about 1938, 1937-38.

[fol. 1305] A. They were one of the big five, I guess I could say yes they make good pictures.

Q. I would like for you to answer the question, I will ask you if it is not generally recognized that Loews make the best pictures, and that was so in 1937-38?

A. I will say yes, then.

Q. About that RKO, what was your complaint about this product?

A. RKO is a small company, there is no advertising power to its product.

Q. How did you go about buying RKO pictures?

A. I had to have something.

Q. You had four others?

A. About the same thing.

Q. Now United Artists and Fox and Columbia, they were all a-ailable to you, United Artists?

A. Well they are in the same class, those companies' product was in the same class as RKO.

Q. Well United Artists of course in that year?

A. Probably have about four or five good pictures, they could make a little money on, and the others just common ordinary pictures, you might say for a B house.

Q. They were then in the same class with RKO?

A. That part of them, yes.

[fol. 1306] Q. How about Fox?

A. Well Fox pictures, they had a few pictures that were pretty good, but those pictures we couldn't get enough to show.

Q. You had them for Morristown?

A. We had them for Morristown, yes.

Q. I will ask you if on October third, 1938, if you did not receive a l-tter from the Department of Justice, dated the first of October, 1938?

Q. What *was* the letter say?

Q. It refers to your letter of the second, October, 1938, to Congressman Taylor?

A. Well I got an answer back, which I wrote to Congressman Taylor, from the department of justice.

Mr. Armistead: I would like for you to produce for inspection by counsel for Crescent, the letter of October first, 1938, to Mr. Thurmond Arnold, or from his office.

A. Do you have that?

Mr. Dobey: We do not have that, I can give you all the others, the reference to it.

Mr. Armistead: Sir?

[fol. 1307] Mr. Dobey: There is a reference to it here, but we do not have the letter.

Mr. Armistead: You do not have this letter?

Mr. Dobey: We do not have the letter.

[fol. 1308] Q. Well, to refresh your recollection, since it appears that the letter is not available and has been misplaced or lost, in the letter from Gen. Arnold, he requested the following information: Statement from you showing your efforts to procure products from each of the major distributors together with the reasons each had given for a refusal to sell pictures to you; (2) The length of time that Peerless Enterprises Theatres have been operated, and the length of time each competing theatre had been operated. Do you remember that.

A. Yes, I believe I gave them the information, but I don't think I put it down in writing. I think I went to Washington and told Mr. Williams.

Q. To refresh your recollection, I will ask you if on October 7, 1938, you didn't write to Mr. Thurman Arnold, as follows: (Reading)

"Dear General: In reply to your letter of October 1, we are giving you the following information:

On March 26, 1937, we opened a theatre in Morristown, Tennessee and at that time there was only one theatre in that town owned by the Crescent Amusement Company Nashville, Tennessee, Mr. Tony Sudekum, President. Before the opening of this theatre, Mr. Castleberry of this organization contacted me, saying that Mr. Sudekum sent him to find out what I would take for the theatre, and I [fol. 1309] told him what I would take, and he informed me

that he would let me know within three or four days. This time had elapsed and he had not gotten in touch with me until about sixty days later when the theatre was open and going and Mr. Castleberry came back and said that Mr. Sudekum had sent him back again to find out what I would take for the theatre after it was up and going. So I gave him a price, and did not hear any more from him until about eight months, when I had secured a lease on a building in Harriman, Tennessee to build a theatre there, this town only having one theatre operated by the same company as stated above.

At this visit, Mr. Castleberry told me that Mr. Sudekum wanted me to come to Nashville and talk over the matter of his buying half interest in our interprise. Within two weeks from that time, I went to Nashville and Mr. Sudekum offered me half the price our enterprise was worth for half interest, telling me that he thought I would be satisfied with the deal with him, as it would be hard for me to get pictures, and that he could save me money, as he could get the pictures cheaper than I could buy them. We did not make any deal as I did not want to sell our for a small amount as other exhibitors had been doing with him as [fol. 1310] he always tried to buy out all opposition that goes up in any town that he is in.

Since that time, I opened a theatre in Harriman, Tenn., June 17, 1938 and one in Newport, Tennessee September 2, 1938. After we secured the lease for the house in Newport, the Crescent Amusement Company immediately makes arrangements to open their second house in that town which was opened one week ahead of our house running at a lower admission price than ours, 15¢ on first run pictures, and we are charging 20¢ admission and running some second run pictures behind them.

Also within two weeks from the time, they started building the theatre in Newport, they erected the second house in Morristown, Tennessee charging 15¢ for this house which is under our admission price 20¢ in that town. We are afraid to lower our prices in either of the towns as he has stated that he will meet our price.

Mr. Sudekum's agent, Mr. Castleberry, approached Mr. Roberts, the man we have our lease with on the Harriman theatre, and tried to buy the building with the intention of keeping us out of Harriman.

At the time Mr. Sudekum talked to me in regard to [fol. 1311] buying half interest in our enterprise, he stated that Harriman, Morristown, and Newport, Tennessee were too small for two theatres; now he had opened his second theatre in Newport, and Morristown, which makes three theatres in these towns.

Mr. J. Winston Baird first erected a theatre in Newport, Tennessee several years ago, then Mr. Sudekum's agent came thru and told him that Mr. Sudekum wanted to buy half interest in his theatre, at which time Mr. Baird refused to sell. Then later, Mr. Sudekum buys two lots in that town and pays $7500.00 for them which is recorded in the court house of Newport, Tenn. and which lots he still holds. After Mr. Sudekum bought these lots, Mr. Baird sold half interest to the Crescent Amusement Company, thinking that they would run him out of business, provided they put up a theatre against him.

A similar case happened just recently at Rogersville, Tennessee, where this same company bought out Mr. Miller's theatre, Mr. Miller thinking it would be better to sell than to lose what he had built up for years.

We have heard it said that Mr. Sudekum has made his brags that before it's over with, he will own every independent theatre in the State of Tennessee.

[fol. 1312] It seems that the Crescent Amusement Company and the producers have violated the Anti Trust Laws. We would appreciate your giving this matter your immediate attention, as it is only a question of time that we can stay in business in these towns if the distributors do not agree to sell us pictures. Yours very truly . . .

P. S. We are attaching separate copies stating why the various producers refuse to sell us product. You have our authority to discuss our complaint with the New York Representatives of these distributors involved."

[fol. 1313] Q. On October 7, 1938,——

The Court: How many pages do you have there?

Mr. Dobey: About 8 or 10.

The Court: Do you think it is very important for you to read them?

Mr. Armistead: Yes, I haven't read them yet. I know this is important. If your Honor is going to take a recess, I will run through them right here.

(Recess.)

Mr. Armistead:

Q. Mr. Smith, this letter that I just read, of October 7, 1938, you signed and mailed that letter to Mr. Arnold?

A. Yes, sir.

Q. Now, I notice in this letter, where you said you made a price, gave Mr. Castleberry a price on your theatre. You referred to which theatre, now, the one at Morristown?

A. Well, there is two or three places where I gave him a price, I guess that was Morristown you are speaking of there.

Q. Yes, I think it is.

A. Is that the first place it came in?

Q. Yes.

A. Yes.

Q. What was that price?

A. I don't recall just exactly what the price was, I [fol. 1314] believe it was around $5,000.00, something like that.

Q. Well, you didn't like it because Mr. Sudekum didn't buy your interest in that?

A. No, I didn't care whether he bought it or not.

Q. Why did you mention that here to Mr. Arnold, then?

A. Well, I just wanted to show he was trying to buy them. I wasn't putting up theatres trying to sell.

Q. Well, you did want to sell, didn't you?

A. Well, I would sell anything I have, but I wasn't putting up theatres to sell.

Q. I didn't ask you that. I asked you, didn't you want to sell that theatre?

A. Well, if I hadn't wanted to sell I wouldn't have give him a price, I don't guess, would I?

Q. Did you want to sell?

A. I wasn't wanting to sell.

Q. I asked you, did you want to sell that theatre?

A. At that price I wanted to sell.

Q. Did you want to at that price?

A. At that price I would have wanted to.

Q. Did you get a reply from Mr. Arnold to that letter?

A. I guess we did.

Q. Have you got it?

A. No sir.

Q. What did you do with it?

[fol. 1315] A. Well, I might have it in my files at the office.

Q. Why was it you kept—Did you keep any correspondence you got from Mr. Arnold?

A. Yes.

Q. Where is that?

A. I guess it must be in my files at the office.

Q. Didn't you show it to a representative of the Plaintiff, the Government?

A. To Mr. Ballou, my attorney at that time——

Q. I said, a representative of the Plaintiff, the Government?

A. I guess they had seen it.

Q. You know they have?

A. I imagine they have seen that, may be got that.

Q. Don't you know it, didn't turn over to a representative of the Government in this case all the correspondence you had?

A. No, I don't think I have.

Q. With Exhibitors of moving pictures and your complaint?

A. I don't think I turned over all the papers.

Q. Which of those did you withhold, what are they?

A. I know I have got a letter or two from Mr. Thurman Arnold.

Q. Why didn't you turn that over?

A. They didn't want it, I guess.

Q. Why?

A. I don't know.

Q. I will ask you if on October 18, 1938, if the Depart-[fol. 1316] ment of Justice didn't write you a letter, acknowledging receipt of your letter of October 7, 1938, and if, in that letter, it wasn't stated, in substance,

> "That many distributors have stated their policy to be the favoring of an old account and that many distributors have refused to sell second runs in small towns. In the event any of the distributors have sold product away from your theatre (referring to your Palace) the following information is requested: (1) The size and admission price and playing policy of your theatre, together with similar information as to the competing theatre: (2) The names of distributors who have diverted product from your theatre to the theatre of your competitor, together with the reasons given for such change: (3) Since you play many pictures not exhibited by your competitor, the Depart-

ment asks what efforts exhibitors have made to procure such product from the distributor and the reason given by them for refusing to license pictures which had never been exhibited in the town."

Didn't you get such a letter?

A. I don't remember whether I got a letter from the Department just like that or not.

Q. Well, after receiving a letter from them, along about that time you went to Washington. Didn't you?

[fol. 1317] A. I don't know whether it was before that time or after that. I went to Washington.

Mr. Armistead: Mr. Dobey, have you got that letter of October 18th from the Department of Justice to Mr. Smith?

Mr. Dobey: I haven't it here; we possibly might have a letter of that date in our files. I can go to the file and see. I would like to ask where you got those letters?

Mr. Armistead: I get a heap of things I don't tell where I get them from, your Honor.

I would like to see that letter if it is available.

Q. While Mr. Dobey is searching for that letter, I will ask you why, in writing to Mr. Arnold on October 7, 1938, you didn't mention in there that you had available for exhibition in Morristown, Harriman and Newport, second run Loew's product, second run RKO, first run United Artists and that you got some pictures from Paramount and that Columbia—Well, you mentioned, I believe, about Columbia—and that you got pictures from independents; why didn't you tell him all that?

A. I probably did tell him everything I knowed when I went there.

Q. I mean, in this letter?

A. I don't remember writing a letter there.

[fol. 1318] Q. I understood you to say a while ago you wrote this letter of October 7, 1938?

A. If you read that letter, I probably——

Q. I have *heard* the letter.

A. Yes, I wrote that long letter you read, yes.

Q. Why didn't you tell Mr. Arnold in that, that you had all this product available?

A. Maybe I told him in the letter before that, what I had, I don't know.

Q. Do you have that? Let's have it?

A. I don't know.

Q. Did you write a letter like that?

A. Well, say I did tell them that. I know I had available, I had those pictures available that you have named.

The Court: He is asking you whether you did or not. Not, "say you did".

A. We did those named, except from Paramount and Columbia, I didn't have those. The others we had available second run.

Mr. Armistead:

Q. I asked you why, in writing to Mr. Arnold, you didn't write him to that effect?

A. I don't know the reason why I didn't write him.

Q. Anyhow, you got a free trip to Washington, didn't you?

A. A free trip?

Q. Yes.

[fol. 1319] A. Who paid my way?

Q. I am asking you, didn't you get it?

A. No.

Q. You didn't get any free trip?

A. No sir.

Q. You went up there and paid your own expenses?

A. I sure did.

Q. And return?

A. Yes, sir.

Q. And never have been reimbursed?

A. No sir.

Q. Never expect to be reimbursed?

A. No sir.

Q. All right. Now, do you know Mr. Fred Gorman?

A. I don't believe I do.

Q. You never have heard of him?

A. I have heard of him.

Q. When was the first time you heard of him?

A. His name sounds familiar but I don't know whether he is the one that told me and gave me the figures that these theatres was taken in by Crescent Amusement Company or not, whether that was Gorman or not; anyhow, I think that is Gorman.

[fol. 1320] Q. What figures do you refer to, Mr. Smith?

A. To the Cherokee Amusement Company, the Newport Amusement Company. Was he the auditor for that company at that time?

Q. He was the bookkeeper for them up there.

A. Well, he is the one then that sent me these figures, what they had taken in at Newport and these other towns up there that way.

Q. Well, was that while he was working for Newport?

A. Yes sir, while he was working.

Q. Cherokee, I mean?

A. Cherokee.

Q. Did you write and get in touch with Gorman or did he get in touch with you?

A. No, he wrote me but he didn't sign any name on it. He told me he was the auditor and he just tore it off and said "Here is some information which will be good in a lawsuit." And he wrote me again.

Q. What lawsuit?

A. The one I had against the Crescent Amusement Company.

Q. That is the one you filed on November 21, 1938 in the District Court at Knoxville?

A. Yes sir.

Q. Now, let's see. You were suing Crescent at that time for treble damages?

A. Yes sir.

Q. And at the same time you were making complaint [fol. 1321] to the Department of Justice?

A. Yes sir.

Q. Now, I want to ask you if in this complaint that you filed in the District Court there at Knoxville if you didn't make this allegation: "Following up said conspiracy the said defendants, Vitagraph, Inc., Columbia Pictures Corporation, Twentieth Century Fox Film Corporation and Paramount Pictures Distributing Company, Inc. have refused to negotiate with the plaintiff for pictures for exhibition in said theatres, and have refused to sell any pictures to the plaintiff for exhibition in said houses."

Now, was that correct when this complaint was filed? Was that true?

The Court: When was it filed, Mr. Armistead?

Mr. Armistead: November 21, 1938.

A. What were those film companies now again? The names of those?

By Mr. Armistead:

Q. Vitagraph, Columbia, Fox and Paramount.

A. Well, Fox sold us at Morristown but they wouldn't sell us at Newport and Harriman and the rest of them wouldn't sell us any other towns except Paramount sold us a few pictures in Morristown.

[fol. 1322] Q. Now, you say that those distributors refused to negotiate with you. Now, that isn't true, is it, in the case of Columbia?

A. Well, what would you think now if Columbia would come up there——

The Court: Well, now, he is asking you.

By Mr. Armistead:

Q. Is that allegation correct? That Columbia refused to negotiate with you?

The Court: Well, he testified that they did offer him, to sell him pictures on terms of twenty five per cent of the cont-act down and he pay for all the pictures as they were released, twenty five per cent——

A. That is correct.

By Mr. Armistead:

Q. Now, you say that these companies have refused to sell you any pictures—well, I believe you said Fox—in these towns, Harriman and Morristown and Newport, Fox sold you at Morristown?

Q. Sold me at Morristown, yes.

Q. And Paramount sold you some pictures?

A. Yes, sir.

Q. Now, you say further in this complaint filed against [fol. 1323] the Crescent: "That the plaintiff has heretofore and for many years done business with said defendants." Had you for many years been doing business with Columbia?

A. Yes sir, I have done business with Columbia way back there in 1929.

Q. And what other years?

A. Well, right on, 1930 and probably done business with them in 1932.

Q. Now, when you went to interview the Department of Justice with whom did you talk?

A. I talked to Mr. Williams.

Q. Who is he?

A. He must be one of the attorneys there in the office.

Q. You were very much interested in seeing the Department of Justice institute this suit against Crescent and these other distributors, were you not?

A. Well, it didn't make any difference much to me in this suit here.

Q. Sir?

A. This suit didn't concern me very much as I am out of the other towns where he is at.

Q. Well, if it didn't concern you so much why did you go at your personal expense to Washington?

A. Oh, that there; yes sir, that concerned me a great deal.

Q. Do you know a man by the name of Hugh Thomas?

[fol. 1324] A. Yes sir.

Q. How long have you been knowing him?

A. I have been knowing Hugh a good bit, several years.

Q. Did you ever tell him that you went into those towns for the purpose of selling out to Sudekum?

A. No sir, I never did. Hugh Thomas came to see me and told me Mr. Sudekum had sent him to see me and wanted to buy my theatres out. I says: "Hugh, Lee Castleberry has been to see me five or six times and never has anything happened." He said: "Well, Mr. Tony told me to see you. He knows I know you well and he wants to see if you will sell." I said: "There is no use talking to me. I don't want to sell unless he gives the price that I have offered him."

Q. When was that?

A. Well, I forget what month. I don't never keep dates.

Q. What year was it?

A. It was about 1938.

Q. What theatre was that he was trying to buy?

A. Well, he would have bought a half interest in all of them.

Q. When you went to Washington and conferred with the Department of Justice did you discuss with any representative there in that department your contemplated suit for treble damages against Crescent?

A. Did I consult anybody in Washington?

The Court: Discuss it with anyone in the Department of Justice at Washington.

[fol. 1325] A. Before I went?

Mr. Armistead:

Q. No.

A. Oh yes, I discussed with Mr. Williams.

Q. And told him you were going to bring that suit?

A. Yes, sir.

Q. And you wanted to see this suit brought here, didn't you?

A. I wanted to see a suit brought, why, sure.

Q. In other words then, you thought you would get some money and have a better opportunity of getting some money out of that treble damage suit if the Government brought this present complaint?

A. I thought I could get pictures anyhow. That is what I had in mind, is getting pictures.

Q. Answer my question.

A. Well, I dropped my suit and that showed I didn't figure on this making me any money, because I dropped my suit against Mr. Sudekum before this ever come up.

Q. Why, you didn't drop your suit against Sudekum until February of 1940 and this complaint was filed in 1938, 1939?

A. I still had this suit pending. This suit was still going.

Q. You weren't interested then in seeing this suit, this present suit brought against Crescent, were you?

A. Well, I would like to see the pictures, get to where people could buy them.

Q. I am not asking you that, now. I am asking if you [fol. 1326] were interested in seeing this present suit brought against Crescent.

A. This suit we are in now?

Q. Yes sir, the one you are testifying in?

A. I would like to see it where it would break up the——

Q. I didn't ask you that. I asked you, were you interested in seeing this suit brought against Crescent.

A. Well, I am not so exactly interested in seeing it brought against Crescent, no.

Q. Well, are you interested at all?

A. I am interested in seeing it where people can get the pictures.

Q. I didn't ask you that.

The Court: He means he was interested in seeing that result accomplished, and if this suit would accomplish that result, he would be interested in it.

A. Yes.

By Mr. Armistead:

Q. Weren't you interested in seeing this suit brought in aid of your trebie damage suit there in Knoxville?

A. At this present time?

Q. No.

A. Yes sir, I would like to have seen it have been brought.

[fol. 1327] Q. Mr. Smith, did you ever rent any property from Miss Katie Zeigler in Knoxville?

A. Yes sir.

Q. When you moved out of that building you owed her some rent?

A. Your Honor, I don't see that that has anything to do with it.

The Court: All right. Answer the question.

A. Yes, I owe her.

Mr. Armistead:

Q. How much did you owe her?

A. I think it was $500.00.

Q. Have you ever paid it?

A. Not yet.

Q. Now, in 1939 you had a building there under lease on Market Street, didn't you?

A. That was the Katie Zeigler building?

Q. No, another building?

A. Yes.

Q. The Maddin place.

A. Yes.

Q. I will ask you if on December 31, 1939 you didn't owe back rent to the extent of $1368.75 on that building?

A. I couldn't say.

Q. Well, that is about correct, isn't it?

A. I couldn't say.

[fol. 1328] Q. You haven't any idea how much rent you owe?

A. No.

Q. Have you paid that rent?

A. I couldn't say.

Q. You don't know whether you paid it or not?

A. No.

Q. Now, I have here, which Mr. Dobey very kindly handed me, what purports to be a copy of the letter of

October 18, 1938, addressed to you and signed by Mr. Thurman Arnold. This letter is the one I referred to a moment ago. I will read it to you and ask you if you received it.

"October 18th, 1938——

The Court: Why don't you see if there is any particular matter in that letter that bears on this suit? I don't see any use reading the whole letter.

Mr. Armisead: Your Honor, the only thing I wanted to bring out in this letter is that Mr. Arnold asked for certain information, that is, the size of the theatre and the admission prices and the playing policy of his theatre, together with similar information concerning—— .

The Court: Well, read that part of it.

[fol. 1329] Mr. Armistead: In this letter it recites, Mr. Arnold seeks the following information from you: "First—size, admission prices and playing policy of your theatre, together with similar information as to the competing theatre.

Second. Names of distributors who have diverted product from your theatre to the theatre of your competitor, together with his reasons for such a change.

Third. As you believe many pictures are never exhibited by your competitor, the Department will appreciate your reply as to your efforts to procure such product from the distributors and the reasons given by them for refusing to license to you pictures which have never been exhibited in the town.

Upon receipt of the above information your complaint"——

The Court: Well, that is practically the same thing you read awhile ago.

Mr. Armistead: Yes sir.

Q. You received that letter?

A. Yes sir.

[fol. 1330] Mr. Armistead: We would like to offer this letter, or a copy of it, as an Exhibit—Defendant's Exhibit No. 47.

(Marked as Exhibit No. 47.)

Mr. Dobey: We would like to offer in evidence the complaint on which Mr. Smith has been examined, dated October 7, 1938, addressed to Mr. Thurman Arnold.

Mr. Armistead: May it please the Court, there are attached to this letter certain documents, which we object to the competency of.

Mr. Dobey: They are a part of the complaint.

The Court: Are they a part of the letter?

Mr. Dobey: Yes, they are all in the form of a letter; there are certain enclosures in addition.

The Court: Here is one letter that is already in the record, relative to the Mountain City proposition; did you make that an exhibit?

Mr. Dobey: I believe so, yes.

[fol. 1331] The Court: In regard to transferring the remaining six pictures on the Mountain City contract to Morristown?

Mr. Dobey: Yes, I think so, but that is all attached as a part of the complaint, these enclosures, and as you will see, with respect to each distributor, the date is October 7, 1938, in which he sets forth the substance of his complaint.

The Court: Well, as to the yellow sheet, being a copy of the letter dated February 15, 1938, to the witness by Mr. A. H. Buren, that will be excluded from this Exhibit, because it is already in the record. The other three yellow sheets, dated August 29th and 23rd, 1937, copies of correspondence with Mr. Austin and Mr. Dyer, will be excluded, because those letters were excluded from the record yesterday on objection. The other letter which appears to be the original letter about which Mr. Armistead cross-examined and relative to the information asked for, they will be admitted in evidence.

Mr. Raftery: May we take a look at them for the distributors?

[fol. 1332] The Court: Yes, sir.

Mr. Raftery: We might have an objection to make.

The Court: All right. They follow up the letters, those about which he has cross-examined.

Mr. Dobey: May it please the Court, you will recall that yesterday some point was made by Mr. Waller to the effect that the Warner Brothers contract for Newport for the 1938-1939 season provided for a minimum of 26 pictures at $10.00 per subject, was for the Newport Amusement Company, not a defendant in the case; of course, it was pointed out at the time that the Newport Company was a subsidiary. At this time, I would also like to call your at-

tention to the fact it is signed by defendant Kermit C. Stengel.

The Court: Well, I admitted it anyway.

Re-cross-examination.

Mr. Dobey: For the Plaintiff:

Q. Now, Mr. Smith, prior to the time you closed your [fol. 1333] theater at Newport on November 19, 1938, and prior to the time you closed your theaters at Morristown and Harriman on December 13, 1938, if you had been able to take the pick of Warner Brothers pictures at $10.00 per picture, would you have been able to continue in business?

Mr. Armistead: I object to that, your Honor.

The Court: Sustained.

Mr. Dobey:

Q. If you had been able to obtain approval of those Warner Brothers contracts, would you have been able to continue in business?

A. Yes, sir.

Mr. Armistead: I object to that, your Honor.

The Court: That is the same question; I sustain the objection. I don't think from his evidence this man could have continued in business if he had gotten all the pictures.

Mr. Dobey:

Q. Could you have gotten the Warner Brothers product?

A. No, sir.

Q. Was it a severe blow?

[fol. 1334] A. Well, I was expecting to get the product, of course.

Mr. Dobey: Now, at this time I would like to offer in evidence the complaint that was filed by Mr. Smith and upon which Mr. Smith was cross-examined.

The Court: All right; let it be admitted.

(Admitted as Gov. Ex. No. 104.)

Mr. Raftery: In this letter there is considerable stuff about that exhibt which has no place in the record. It is substantially what he would testify to, with the exception of that.

Mr. Dobey: This hasn't been numbered yet; what is the number of that Exhibit?

Clerk Wasson: No. 105.

Mr. Dobey: Now, I would like to read the paragraph of Mr. Smith's complaint with respect to Columbia Pictures, concerning which Mr. Smith was cross-examined by Mr. Armistead: (Reading):

> "That the plaintiff through its officers in September [fol. 1335] 1938, sought to buy from the Columbia Pictures Corporation such of its products as were open for the towns of Harriman, Newport and Morristown, Tennessee; that the officers of the plaintiff were informed that said defendant had three years product open for the above towns, (That is to say, that the pictures made by this defendant for the past three years had never been exhibited or sold for exhibition in said towns) but plaintiff was further informed that these pictures could not be offered to the planitiff nor a price quoted thereon until said defendant had contacted and consulted with the president of the Crescent Amusement Company. That said defendant at that time through its representatives stated that it was known by said defendant that the plaintiff was needing pictures very badly. That shortly thereafter a representative of the defendant called upon the officers of the plaintiff at Knoxville, Tennessee and offered to sell said product to the plaintiff, provided the whole of said product was contracted for and provided that the plaintiff paid at the time said contract was executed 25% of the entire purchase price of said picture. That the defendant well knew that such payment was irregular, unheard of and impossible to any exhibitor of motion pictures. That the usual and ordinary manner of sell- [fol. 1336] ing pictures is to ship the films C. O. D. or for the exhibitor to mail a check therefor when each picture is booked. That said scheme on the part of said defendant is not practiced with any other exhibitors of its products and said deposit is not required of the Crescent Amusement Company or other exhibitors. That the plaintiff is not indebted to said defendant in any amount and that said demand was in furtherance of the scheme or conspiracy with said Crescent Amusement Company to withhold pictures from the plaintiff and was in violation of the Anti-trust Laws. * * *"

The Court: Well, that is practically the same thing he has already testified to.

Mr. Dobey: Yes, but Mr. Armistead questioned him about certain——

The Court: What purpose is that offered for? There is no use to duplicate the record; he has testified practically to the same thing.

Mr. Dobey: Well, Mr. Armistead questioned him on a paragraph of that complaint with respect to Columbia pic-
[fol. 1337] tures Corporation, as to which Mr. Smith was questioned, I will say that the complaint is slightly inaccurate; but we want to get down to that part dealing with Columbia Pictures Corporation; they are all there, as Mr. Smith testified to.

The Court: All right.

Mr. Frolich: Of course, we don't agree to that. But that is a matter for your Honor to decide.

The Court: Yes, I will decide that.

Mr. Dobey:

Q. Did you draw that complaint, or did your lawyer draft it, Mr. Smith?

A. My lawyer.

Mr. Frolich: And not repudiated by him?

Mr. Dobey: Don't answer that question.

Q. What pictures were you playing at your theaters in Knoxville and Fountain City?

Mr. Raftery: We object to Fountain City; the record is
[fol. 1338] big enough without bringing that out.

The Court: Is there any complaint about Fountain City?

Mr. Raftery: No, sir.

The Court: No, there is no question of competition in Knoxville?

A. No, sir.

Mr. Dobey:

Q. What pictures were you playing at Fountain City, and what features were you playing at the time at Fountain City?

A. We were playing anybody's pictures at Fountain City, only except Warner Brothers, when we first opened; of course, they promised pictures at their first run but we never did get them, and that was the only objection on that.

Q. How about Paramount and R. K. O.?

A. Paramount, we played those.

Q. How about Columbia?

A. We didn't play Columbia.

Q. Fox?

A. Played Fox.

Q. Do you owe any of these film companies any money?

A. Well, I owe Universal.

[fol. 1339] Q. How much?

A. I believe it is $75.00.

Q. Do you owe anybody else?

A. I don't know of any other film company that I owe a penny to.

Q. How do you pay for your pictures?

A. Well, if we don't send a check with the letter we have to pay for them C. O. D. when they arrive.

Q. At Harriman and Newport, did you pay for the pictures C. O. D.?

A. Yes, sir; sometimes mailed a check.

Q. Sometimes mailed a check. Did you get the pictures?

A. Yes, sir.

Q. And when you stated yesterday that it was customary to pay for films in advance, you meant on a C. O. D. basis?

A. Sure, that is it.

[fol. 1340] Mr. Dobey: You did not mean you had to pay twenty-five per cent of the total amount of the contract?

A. No, not up to date.

The Court: Well he said that is the only time that he had a contract to make a twenty-five per cent deposit.

Mr. Dobey:

Q. Now at Morristown, Harriman and Newport, I believe you had the RKO pictures, Metro Pictures, and United Artists?

A. Yes, sir.

Q. Was that second run with respect to RKO and Metro?

A. Second run.

Q. And United Artists first run?

A. First run.

Q. Now with respect to the United Artists pictures, do you know whether or not you took all pictures, or whether or not Crescent had selected five best ones out of the season's product?

A. I believe I had all those pictures.
Q. How many pictures were there?
A. I think there were around thirty, I aint for sure.
Q. For one season?
A. For one season, yes.
[fol. 1341] Q. Now with respect to all these pictures, you did not play on the RKO contract second run, Metro second run, and United Artists, if there were any, I believe there were, was the reason you——

The Court: Now ask him what was the reason, you have been leading him entirely too much, ask him what was his reason.

Mr. Dobey:

Q. Why didn't you play all those pictures?
A. Probably we were closed down and didn't have a house to play them in.

Mr. Dobey: That is all, it was obvious, I didn't want your Honor to miss it.

Q. Now with respect to Paramount.

Mr. Raftery: I think it is obvious that he did not pay for them.
Mr. Dobey: Has the Crescent Amusement Company paid for any pictures they never played?
Mr. Raftery: You bet there is.

The Court: Ask the witness.
[fol. 1342] Mr. Dobey: The testimony in the deposition is that they paid for all pictures they did not play.
Mr. Raftery: I am speaking for the United Artists.
The Court: All right.

Mr. Dobey:

Q. Now did Paramount sell you any pictures until after you filed suit against them, and after you had made your complaint to the department of justice of this, except when you very first started and they quit for a period; is that correct?
A. I think that is correct.
Q. After they quit selling, did they sell you any more pictures until you complained to the department of justice?
A. I don't think they sold me any pictures then.

Mr. Armistead: He has testified to that, he said he was getting from Fox and Paramount.

Mr. Dobey:

Q. At Morristown?

A. We got pictures for a while and they told us they couldn't sell anything anymore.

[fol. 1343] Q. How about Newport?

A. We didn't get any there.

Q. You never got any there?

A. No.

Q. With respect to the theater at Newport, the second theater you opened in that town, did you know who started construction first on the second theater in Newport, you or Crescent Amusement Company?

The Court: He started first, Crescent started second and beat him to it. We have been over that.

Mr. Dobey: That is all.

Mr. Frolich: I would like to offer an answer of Columbia in the damage suit of 1938, I want to offer it in evidence as defendant's exhibit m—.

The Clerk: Columbia's exhibit, next number will be C-38.

The Court: We are not going to try that lawsuit.

Mr. Frolich: I would like to read to the Court just one sentence on page three of Columbia's answer, it is exhibit forty-eight, "It is the usual and customary policy of this [fols. 1344-1345] defendant to require a deposit of twenty-five per cent of the film requirements where there is any doubt of the performance of the contract by the exhibitor, and from defendant's experience with the plaintiff, the requirement of the twenty-five deposit was entirely justifiable and reasonable."

My object was to show that Columbia took a decided position in the lawsuit by asking for that deposit.

The Court: Any further questions? Call the next witness.

Further deponent saith not.

[fol. 1346] ANDY ANDERSON, next witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. Andy Anderson, Hartford, Kentucky.

Q. Try to speak so these gentlemen over here can hear you too. What is your occupation?

A. I operate a chain of theaters.

The Court: Talk a little louder, please sir.

Mr. Wright:

Q. Whereabouts?

A. In Hartford, Eddyville, Beaver Dam, Kentucky.

Q. One theater in each of those towns?

A. Yes, sir.

Q. How large are those?

A. Hartford is about fourteen or fifteen hundred, — is about the same, Beaver Dam is about twelve or thirteen hundred, and Eddyville, I think is a little less than two thousand.

Q. You were formerly employed by the Crescent Amusement Company?

A. I was.

[fol. 1347] Q. When was it you worked with them?

A. I began with them about January first, 1936, and left I think it was in April of 1937.

Q. In what capacity?

A. As manager of the Alhambra theater in Hopkinsville, Kentucky.

Q. And after you left the Crescent Company you were associated with two other men I believe in the operation of the Kentucky theater at Hopkinsville?

A. That is right.

Q. Who were the other two?

A. F. M. May of Owensboro and Cecil P. Taylor of Beaver Dam, Kentucky.

Q. That Kentucky theater was opened when?

A. June, 1937.

Q. Will you describe that theater?

A. Well it was an old building that had been a theater, we remodeled and equipped it.

Q. How long had that been closed?

A. I think it was closed around 1930.

Q. Prior to that time, do you know who operated it?

A. Crescent Amusement Company was operating it prior to that time. It had been closed since 1930.

Q. And then what was the remodelling you did when you opened it?

[fol. 1348] What is that?

Q. Describe the remodelling that was done?

A. We went in there and built rest rooms, changed the building and front, and put in new wood all over the entire building and built some offices upstairs, and built a new booth.

The Court: That is the Alhambra?

A. That is the Kentucky, we remodeled the whole thing inside almost except the floor, we didn't do anything to it, and built a room in the back of it for an airconditioning unit.

The Court: How much did you spend on the remodelling?

A. I think around five thousand dollars.

The Court: Where is the Kentucky theater located?

A. It is on Ninth street in Hopkinsville, across from the Princess, around five thousand dollars spent as well as I remember.

Mr. Wright:

Q. How much did you spend for equipment there?

A. Well equipment and remodelling both run around fifteen thousand dollars.

Q. At the time you opened there were two other theaters operating in Hopkinsville?

A. There were.

Q. What were they?

[fol. 1349] *Q.* The Alhambra and Princess.

Q. Both operated by the Crescent Amusement Company?

A. That is right.

Q. Will you describe those theaters?

A. The Alhambra was a very nice house, seated around nine hundred, and the Princess I think it seated around five or six hundred.

Q. What kind of a house was it?

A. It was a much smaller house, not near as nice as the Alhambra.

Q. How did it compare with your Kentucky?

A. The Princess?

Q. Yes?

A. It didn't compare.

Q. Was it better or worse?

A. I think the Kentucky was a much better house than the Princess.

Q. And how big was the Kentucky?

A. About four hundred and fifty.

Q. When you opened the Kentucky, what admission prices did you charge?

A. We charged twenty-five top with two cents tax.

Q. And what were the top admission prices of the other theater?

A. The Alhambra?

[fol. 1350] Q. The Princess?

A. The Alhambra was gettting thirty-five cents for some of the pictures on Sunday and Monday, and the rest of the time twenty-five with two cents tax, and I think the Princess was getting around fifteen and twenty cents.

Q. Was there any change in the Alhambra and Princess prices after you opened?

Mr. Waller. We object to that, I think it goes in the same classification as bank night, and so on.

The Court. Overruled for the present.

A. There were lots of changes in prices.

Mr. Wright: Q. In which direction?

A. Down.

Q. You mean the policy followed from week to week, the policy varied?

A. Yes, from week to week and from day to day, sometimes.

Q. Did you vary your admission prices?

A. I did not. I did change it once in a while on big pictures.

Q. What pictures were you showing when you opened at the Kentucky?

A. When we opened we had Paramount and Columbia [fol. 1351] first run and we had Grand National.

Q. That is Columbia and Paramount, were they for what season?

A. Those were for 1937-1938.

Q. Talking about now in the spring of 1937, when you opened?

A. Those were 1937-38 first run contract.

Q. Your Paramount was 1937-38, first run?

A. Yes, that was 1937.

Q. You opened the house in 1937?

A. I think that was 1937-38 product, I am not sure about that.

Q. I believe that the contracts show that you were buying 1936-37 Paramount Product, first run, were you buying 1936-37 Paramount Product, first run, when you opened?

A. That is right, it was 1936-37.

Q. The 1937-38 season had not started?

A. That is right. I am sorry, that is right.

Q. And the same was true with Columbia?

A. Yes, sir.

Q. That was the 1936-37 product you were playing as first run?

A. Yes, sir.

Q. Did you have some second run too?

A. We did, we bought later Fox and also Warner Brothers.

[fol. 1352] The Court: Second run?

A. That is right.

Mr. Wright: Q. Did you try to get Paramount first run for the 1937-38 season?

A. I did.

Q. I show you these letters here, a letter Dated October 11, 1937, from a Paramount salesman to you, and another dated October 14, 1937, from the Paramount's Branch Manager to you, and ask you if you received those shortly after the dates they bear?

A. That is right.

[fol. 1353] Mr. Wright: I would like to have these marked the next number of the Exhibit, Exhibit No. 105.

(Letter marked Government Exhibit 105)

Q. I notice the letter of October 11, 1937, Government Exhibit No. 105, which was just shown to you, refers to a letter of October 7th from you. Have you got a copy of that letter?

A. I don't believe I have.

Q. By looking at this letter, can you recall the substance of what your letter of October 7th was?

A. Well, I was trying to buy that product, I think I wrote the letter asking whether there was a chance for us to make a deal for that product.

Q. Was it with reference to first run?

A. Yes.

Q. This letter of October 14, marked Government Exhibit No. 106, for identification, refers to your telegram of October 12th. Have you got a copy of the telegram?

A. No I have not.

Q. Can you recall what the substance of the telegram was?

A. Well, after I received that letter, saying they had sold first run here, I wanted to know whether second run was available.

Q. This letter of October 14th is the reply you got?

A. That is right.

Mr. Wright: I offer these in evidence.

[fol. 1354] (Government Exhibits 105-106, offered in evidence)

Q. Now then, I show you a photostat of a telegram from you to Metro-Goldwyn-Mayer Pictures, dated October 13, 1937, and ask you if that is a copy of the wire you sent that company on or about that date?

A. That is.

Q. And this letter of October 13, 1937, from Mr. Avey to you, was the reply to the telegram, shortly after the date of it?

A. Yes sir.

Q. This letter of November 29, from you to Loew's, is that the next communication that passed between you, written by you between that date?

A. I believe it is because I was asking them to reply to it.

Q. And that letter of November 30th, from Mr. Avey to you, was the reply that was received shortly after that date?

A. That is right.

Q. And this letter of December 1, 1937, from you to Mr. Avey, is the next letter you wrote to him on or about that date?

A. That is right.

Q. With reference to this letter of December 1, 1937, from you to Mr. Avey, did you receive a reply to that letter?
A. I must have. I don't recall, I don't remember.

Q. I will show you this letter from you, dated December [fol. 1355] 24, 1937, to Mr. Avey; does that refresh your recollection as to whether you received a reply on December 1st?

A. Well, I am asking for a reply, in this letter.

Q. What is the date of that letter?

A. This is December 24th, I am still asking for a reply. I say here: "I have received no reply".

Q. This letter of December 24, 1937, evidently refers, then, to some letter you wrote between December 1, 1937, and December 24th?

A. That must be, because I am still asking for a reply, in regard to second run.

Q. Have you got a copy of an intermedite letter that you received?

A. No sir, I don't suppose I have.

Q. All you recall is, that you were asking for second run?

A. That is right.

Q. This letter of December 29, 1937, from Mr. Avey to you was a reply that you received shortly after that date?

A. That is right.

Q. This letter dated February 11, 1938, from you to Mr. Avey was the next letter you wrote to him?

A. That was the next letter, I believe.

Q. This letter from Mr. Avey to you, of February 16, 1938, ~~is the reply that~~ you received from him?

[fol. 1356] A. That is right.

Q. And this letter of February 17, 1938, from you to Mr. Avey is the next letter you wrote to him?

A. Yes, this letter, in reply to that February 16th letter.

Q. This letter dated March 11, from you to Mr. Avey, is a copy of the next communication?

A. Yes.

Q. This letter dated March 12, 1938, from Mr. Avey to you, is a copy of his reply?

A. It is.

Mr. Wright: I will ask to have this correspondence just identified as the next Government Exhibit numbers.

The Court: Do you wish to have them marked in the same order.

Mr. Wright: In the same order they have been identified.

Mr. Wright: I would like to read the Paramount letters that I have previously offered.

The Court: That is Exhibit 105?

Mr. Wright: Yes. (Reading)

"Dear Mr. Anderson: Thanks for your letter of October 7, and in reply thereto, I wish to advise that we have closed a deal with Mr. Sudekum for Paramount Pictures for his circuit in the coming year. I regret [fol. 1357] that we will not be in a position to offer you service for Hopkinsville, but trust you will have no difficulty in arranging your plans for the coming season.

With reference to the adjustment on the "C" product, this will advise that this adjustment is in New York and we hope to hear from it in a few days.

Kind regards. Very truly yours * * *"

Q. In this letter of October 11, 1937, to you from Mr. L. C. Lowe, Paramount salesman, addressed to you at Hopkinsville, Kentucky, I notice a reference to an adjustment on the "C" product. Was that "C" product of the 1936-1937 season?

A. That is right.

Mr. Wright: The letter dated October 14, 1937, Government Exhibit No. 106, is from Cecil E. House, Branch Manager, Paramount, to Mr. Anderson, and reads as follows: (Reading).

"Dear Mr. Anderson: I thank you for your telegram of October 12, in which you expressed interest in the second run of our product in Hopkinsville.

We regret that we are unable to offer this service.

Kind regards. Yours very truly * * *"

Mr. Wright: I will offer in evidence the telegram and letter that passed between Mr. Anderson and Metro, marked [fol. 1358] Government Exhibits Nos. 107 and 108. Also Government Exhibits Nos. 109 and 110. While those are being inspected, I would like to read Government Exhibit No. 107, which is as follows: (Reading)

"METRO GOLDWYN MAYER PICTURES ATLA—

IS YOUR PRODUCT AVAILABLE FIRST OR SECOND RUN HOPKINSVILLE WILL APPRECIATE REPLY WESTERN UNION IMMEDIATELY—

KENTUCKY THEATRE ANDY ANDERSON."

Q. How came you to send that telegram, Mr. Anderson?

A. Well, I wanted——

Q. Did you observe Crescent had been using it there?

A. They had been using first run, yes. I wanted to get second run. At that time I didn't know about the coming year, whether it had been sold or not. That was in October. I don't think that product had been sold to Crescent at that time, I wanted it for my first run.

Q. That was your impression, at that time.

A. That was my impression.

Mr. Wright: I will read the reply of Mr. Avey, dated October 13, to Mr. Anderson, filed as Government Exhibit No. 108—I see this is from the Secretary of Mr. Avey. (Reading)

[fol. 1359] "Dear Mr. Anderson: With reference to your telegram of today, please be advised that Mr. Avey, our Branch Manager, is out of the city at this time but immediately upon his return, your telegram will be brought to his attention. Yours very truly • • •"

Mr. Wright: The next letter is Government Exhibit No. 109, dated November 29, 1937 and is a letter to Loew's Inc., Atlanta, Georgia. (Reading)

"Gentlemen: Some time ago you promised me a reply regarding your product for this situation. Would appreciate knowing something definite by return mail. We are interested in first run. Very truly yours • • •"

I read next letter from Mr. Avey to Mr. Anderson, Government Exhibit No. 110, dated November 30, 1937, as follows:

"Dear Mr. Anderson: Thank you very much for your letter of inquiry of November 29th. Please be advised that our product has already been sold first run in Hopkinsville. Yours very truly • • •"

I next read Government Exhibit No. 111 a letter dated December 1, 1937, from Mr. Anderson to Mr. Avey: (Read-
[fol. 1360] ing)

"Dear Mr. Avey: Thank you for your prompt reply. Since your product is sold first run, please advise if second run is available. Very truly yours • • •"

The next is a letter of December 24, 1937, from Mr. Anderson to Metro, Atlanta, Georgia, Government Exhibit No. 112, which is as follows: (Reading)

"Gentlemen: Several weeks ago I wrote you asking if your pictures were available to the above theatre second run. Up to now I have received no reply.

Will you please let me have this information by return mail.

Very truly yours • • •"

(Recess.)

[fol. 1361] Afternoon Session

Mr. Wright: If your Honor please, I believe the last letter was—

The Court: Exhibit 112 is the last, I think, that I have.

Mr. Wright: That was the letter of December 24th, asking about second run pictures. The reply of Mr. Avey to Mr. Anderson dated December 29, 1937, Government's Exhibit No. 113, reads:

"Thanks for your letter of December 24th.

"Our Tennessee Sales Representative, Mr. C. F. McGuire, will call to see you shortly after the first of the year."

Q. Now, Mr. McGuire came to see you, did he?

A. He did, sometime right after Christmas.

Q. Where was that at, Hopkinsville?

A. At Hopkinsville.

Q. What did he have to say?

A. Well, he came in there and I asked him about the product and he said he didn't have any information; that he didn't have any cut-offs; he just drove up from Nashville and didn't know anything about the situation and he [fol. 1362] couldn't quote me any figures or talk about any contracts, and he didn't know anything about it.

Q. This next letter is dated February 11, 1938 from Mr. Anderson to Mr. Avey, marked Government's Exhibit No. 114.

(Letter not handed to reporter).

Q. Was this conversation you were referring to in the letter of February 11th the latter conversation you had with the salesman?

A. No, I think he was—no, that was to the conversation we had in January when he was up there. Nothing ever happened and I think that was the reason for my writing that letter.

Q. Well, the letter says here; under date of February 11th, "Your representative was in to see me about ten days ago and we discussed second run contract for this house."

A. Maybe that was the first time he was there, around the 1st of February. I don't recall exactly when it was.

Q. At any rate the discussion you referred to in the letter was the discussion you have already described?

A. That is right.

Q. Then a reply was written from Mr. Avey to Mr. Anderson dated February 16, 1938, marked Government's Exhibit No. 115:

> "Replying to your letter of February 11th, from the report furnished us by our Representative, Mr. C. F. McGuire, who called on you recently, we understood [fol. 1363] that you had more product under contract than you had playing time for this season and that the prices you could afford to pay for our product would barely cover the handling charge.
>
> Please let us know just what you are asking of us."

Q. Had you had any conversation with Mr. McGuire with respect to prices or playing time?

A. None whatsoever except I told him I would be willing to pay in line with what I was paying the other companies, second run, but he said he couldn't quote me any prices and didn't know anything about it.

Q. What, if anything, was said with respect to the amount of playing time you had?

A. I don't recall of anything being said. If there was anything said about playing time it was very little because he didn't want to discuss product.

Q. The next letter is a reply of Mr. Anderson to Mr. Avey dated *dated* February 17, 1938, Government's Exhibit No. 116:

> "Your letter dated February 16, received.
>
> "Contrary to what you understand we do not have enough product to last us until the end of this year. You know as well as I do that Crescent does not buy until shortly before the first of the year and no com- [fol. 1364] pany will sell me without first being turned

down by Mr. Sudekum. You are aware, too, how far behind release that causes product to be played.

"Your representative, Mr. McGuire, quoted me no prices and where you obtained 'the afford to pay prices' is beyond me.

"I feel sure that the rental of your pictures will be in line with some other product I have second run or I would not require a second run deal.

"I realize that because of circumstances I am due for 'a little kicking around'. I am willing to take it up to a certain point but beyond that it becomes another matter. I am sure, Mr. Avey, if you were in my situation you would feel somewhat the same as I do.

"Would appreciate learning from you by return mail definitely whether you intend to sell me second run or not. Please do not stall me any longer."

Now, this was about this six months after the 1937-1938 season pictures had begun to be released, wasn't it?

The Court: That is 117?

Mr. Wright: 116.

Q. Then the next letter is from Mr. Anderson to Mr. [fol. 1365] Avey, dated March 11, 1938, marked Government's Exhibit No. 116.

"Will you please favor me with reply to my letter concern- second run deal for this theatre"?

The next letter is dated March 12th from Mr. Avey to Mr. Anderson, Government's Exhibit No. 118:

"I have just returned from my vacation and find your letter of February 17th in reply to ours of February 15th.

"I do not understand your letter and under the circumstances we deem it advisable that our Tennessee representative, Mr. C. F. McGuire, or if possible the writer, visit you in order to ascertain just what your wishes are regarding our service. We will let you know just as soon as we can do so."

Q. Now then, did Mr. Avey or Mr. McGuire come to see you?

A. Mr. Avey came to see me in April.

Q. Where was that, at Hopkinsville?

A. In Hopkinsville.

Q. Was anybody else with him?

A. No, he was by himself.

Q. What was the conversation you had then?

A. Well, there wasn't anything except that we made a second run deal at that time.

Q. He finally offered you the product?

A. Yes.

[fol. 1366] Q. That was for what season?

A. 1936-1937.

Q. That was the season preceding the then current season?

A. That is right. It wasn't a full deal at that time because some of the product had been played there second run at the Princess Theatre.

Q. The product you bought second run was what had been previously played at the Princess for 1936-1937?

A. That is right.

Q. I will show you this contract dated April 12, 1938, approved April 25th, between yourself and Metro for second run, 1936-1937 product at the Kentucky Theatre at Hopkinsville, and ask you if that is the contract that you negotiated with Mr. Avey.

A. It is.

Q. This letter from Mr. Avey to you, dated April 12, 1938 is the letter you received with the application for the contract which has just been identified?

A. That is right. It was attached.

Q. When you had the talk with Mr. Avey about the second run 1936-1937 deal was anything said about the 1937-1938 product?

A. Yes sir. That is the product I wanted and they wouldn't let me have it, saying that they wanted to play off this 1936-1937 and then perhaps we would make a deal for the 1937-1938.

Mr. Wright: I will call attention—I want to call to your [fol. 1367] Honor's attention to the language in the contract that was made, which says, under the playing arrangements: "Exhibitor agrees to play or pay for three pictures per month commencing June 1, 1938 in order of release if and as available."

Then I will offer in evidence this letter dated April 12, 1938 from Mr. Avey, marked Government's Exhibit No. 119 for identification. This letter reads as follows:

"Following up the writer's personal call at your office at your Kentucky Theatre in Hopkinsville on April 7th, we are enclosing herewith applications for Metro-Goldwyn-Mayer's pictures of the 1936-1937 season for second run in Hopkinsville in exact accordance with the proposal which you made at that time.

"Since the 1936-1937 product covered by your application is available for second run, and if we hope to receive any revenue while the prints are in service, it is necessary that we complete contractual relations as early as possible in order that we may begin to realize revenue from the second run in the town of Hopkinsville. You are, therefore, advised that unless these applications properly executed are in our hands before the close of business one week from this date we shall take such steps as we may deem advisable for the disposition of this product for second run [fol. 1368] in Hopkinsville. Please sign all copies of the application and also initial all copies of the rider which are attached to the applications.

"Thanking you for the courtesies extended me during my visit with you and with kindest regards, we are * * *"

Q. Then you did execute the applications and send them in immediately?

A. That is right.

Q. And they were accepted?

A. Yes.

Q. I call your attention to two letters here, one dated May 4, 1938 from you to Mr. Avey and the reply dated May 10th, 1938 from him to you, and ask you if those letters were respectively written and received by you on or about the dates they bear?

A. They were.

Mr. Wright: I will ask to have these two letters marked Government's Exhibits No. 120 and 121.

(Letters so filed and marked.)

[fol. 1369] Mr. Wright: I will also ask to have this application, dated November 8, 1937, acceptance November 23, 1937, between Crescent Amusement Company and Metro

for the exhibition of the 1937-1938 product, first run, in Hopkinsville, marked Exhibit L-15.

(Marked Gov. Exhibit L-15.)

Government's Exhibit No. 120 is a letter from Mr. Anderson to Mr. Avey, dated May 4, 1938, which reads as follows:

"Dear Mr. Avey:

You will note from the attached ad, which appeared in yesterday's local paper, that the Alhambra Theatre is running some of the pictures on a two-for-one basis. The admission price at the Alhambra is: Matinee 20¢, Evening 25¢. This two-for-one plan, makes it actually: Matinee 10¢, Evening 12½¢. I am wondering if anything can be done to stop the showing of first run pictures of this caliber for this cut rate admission.

Kindest personal regards.

Sincerely yours, Andy Anderson."

The Court: What is the number of that exhibit?

[fol. 1370] Mr. Wright: That is 120, if the Court please.

Q. What pictures were you referring to in this letter that had been run on a two-for-one basis?

A. I really don't remember what pictures they were.

Q. What pictures, what companies?

A. Metro-Goldwyn-Meyer.

Q. Those were pictures released for the 1937-1938 season?

A. They were first run pictures.

Q. And those pictures were then being played in Hopkinsville, first run, at this two-for-one admission price?

A. They were.

Q. At twenty-five cents?

A. That is right.

Q. And then the letter, the reply from Mr. Avey, dated May 10, 1938, marked Government Exhibit No. 121, reads:

"This will acknowledge your letter of May 4th in regard to admission prices. Thank you for bringing this to my attention."

After you received that letter, was there anything done with reference to the admission price at which the Alhambra was showing the 1937-1938 pictures?

A. Nothing whatsoever.

Q. They continued to show them at two for a quarter?
A. Yes, sir, sometimes three for a quarter.

[fol. 1371] Mr. Waller: If your Honor please, there is nothing in the bill of particulars about double features.

A. It was two admissions for the price of one.

Mr. Wright: I want to offer at this time Government's Exhibit L-15, Metro contract for the 1937-1938 season. And I would like to call your attention to the admission price provision in Mr. Anderson's contract for second run of the 1936-1937 features, which stipulates a minimum evening and matinee adult admission price of twenty-five cents.

The Court: Is that the contract with MGM?

Mr. Wright: Yes, that is Government's Exhibit L-11. Government's Exhibit No. L-15 is the MGM contract with Crescent for the 1937-1938 features, which provide also minimum adult admission price of 20 cents and the same for the matinee.

Q. Now, I hand you another series of letters exchanged between yourself and Metro; the first from you to Mr. Avey, dated June 2, 1938, and a copy of the letter written by you on or about that date?

A. That is right.

[fol. 1372] Q. And a letter in reply to Mr. Avey, dated June 24, 1938, that was received by you shortly after that date?

A. Yes, that is the letter.

Q. Is this a letter of June 25, 1938, from you to Mr. Avey a copy of the next communication you have?

A. That is right.

Q. And this letter from Avey to you dated June 28, 1938, is his reply, is it?

A. It is.

Q. And this letter of July 31, from you to him, in reply to his last letter?

A. Yes.

Q. And the letter of Mr. Avey to you, dated August 2, 1938, is the next communication you received?

A. That is right.

Q. And this letter of August 8th, from Mr. Avey to you, was the next communication you received from him?

A. It is.

Q. This letter of August 10, from you to Mr. Avey, is a copy of your reply to that letter?

A. It is.

Q. And the letter from Mr. Avey to you dated August 12 is his reply to your last letter?

A. It is.

[fol. 1373] Q. And the letter of August 15th, from you to Mr. Avey is the next letter you wrote him?

A. It is.

Q. And the letter from Mr. Avey to you, dated August 17th, 1938, is in reply to your letter of August 15th?

A. It is.

Q. And this letter of August 18th from you to Mr. Avey is the next letter you wrote him, or a copy of it—or it is the letter itself, I believe, or a photostat?

A. It is.

Q. And the letter of August 22nd from him to you was the next letter you received from him?

A. It is.

Q. And the letter of August 29th from you to Mr. Avey is your reply to his of the 22nd?

A. It is.

Mr. Wright: I will ask to have all these letters which have just been identified, marked exhibit with the Government's serial numbers, in the order of the dates of them.

The Court: All right, let them be so marked.

[fol. 1374] Mr. Wright: I offer in evidence those that have been marked from Nos. 122 to 125, inclusive: The letter dated June 22, 1938, from Mr. Anderson to Mr. Avey, Government Exhibit No. 122, as follows:

[fol. 1375] Mr. Wright: Government's Exhibit number 122, is as follows:

> "I would like to buy your 1938-39 product for this theater, second run, when you are ready to sell it. Please give me the opportunity of working out a deal with you before you sell elsewhere."

Letter from Mr. Anderson to Mr. Avey, June 22, 1938.

A letter dated June 24, 1938, government's exhibit number 123, letter from Mr. Avey to Mr. Anderson, which reads as follows:

> "Replying to your letter of June 22nd, please be advised that we have not as yet closed a first run deal for our 1938-1939 product in Hopkinsville."

Government's exhibit 124 from Anderson to Avey, dated June 25, 1938, and reads as follows:

"Thanks for your letter dated June 24.

"Would also like to make a deal with you for your 1937-38 product, second run, in Hopkinsville. Please allow me the opportunity of working out one with you when you are ready."

Reply of Mr. Avey to Mr. Anderson, August 2nd, 1938, government's exhibit number 125, is as follows:

"Regarding your letter of July 31st, with reference to 1937-38 product second run in Hopkinsville, please [fol. 1376] be advised that Mr. Avey is out of the city at this time but immediately upon his return your letter will be brought to his attention."

Letter of Mr. Avey to Mr. Anderson, June 28th, 1938, Government's exhibit No. 126, and reads as follows:

"Replying to your letter of June 25th, stating that you would like to make a deal with us for our 1937-38 product, second run, in Hopkinsville, I would like to call your attention to the fact that you have twenty-seven (27) pictures undated on our 1936-37 contract. We dislike to place our product under contract unless we know it will be played.

"With the fine quality of product undated I wish you would work out as many dates as you can for July and August in addition to any you have already furnished us with and if by the end of August you have played this product in a manner that would indicate to us that you intend to play the product and not just tie it up, we will be glad to discuss the placing of additional product with you for second run in Hopkinsville."

Letter from Mr. Anderson to Mr. Avey, July 31, 1938, Government's Exhibit No. 127, as follows:

"I am ready to make a deal with you for the 1937-38 [fol. 1377] product, second run, Hopkinsville. I can make a similar deal to the 1936-37 one.

"I have dated all subjects on the present contract and I believe that they will stand with the exception of a few which I might have to move up. Kind regards."

Mr. Wright: At that point I would like to offer the letters in answer to interrogatory 16 I believe it is, which shows at the time this letter—I will have to have it marked first with the next L. number.

The Clerk: L-No. 16.

Mr. Wright: That play-off sheet number L-16.

Government's exhibit number L-16 shows that Mr. Anderson had played three pictures, three MGM pictures for his second run, 1936-37 contract during the month of June at the time this was written, and you will recall that the contract provided for a play-off at the rate of three per month beginning with June first.

Q. Now I call your attention, Mr. Anderson, to the statement in this letter with respect to undated product: do you recall what the facts were at that time with respect to pictures in June that had been dated?

[fol. 1378] A. He is wrong here, there were more pictures than that dated at that time.

Q. What does that contract call for, a total of how many pictures?

A. The contract is over there I believe. Will you get the contract I think it was a total of 29 pictures, and I know I had more than that played or dated, many more than that.

Mr. Wright: Government's exhibit No. 127 dated July 31, 1938, is a letter from Mr. Anderson to Mr. Avey:

> "I am ready to make a deal with you for the 1937-38 product, second run, Hopkinsville. I can make a similar deal to the 1936-37 one.
>
> "I have dated all subjects on the present contract and I believe that they will stand with the exception of a few which I might move up."

This contract is a contract for twenty-nine pictures.

Government's exhibit number 128, August 8, 1938, letter from Mr. Avey to Mr. Anderson:

> "Replying to your letter of July 31st, with further reference to our 1937-38 product, second run, Hopkinsville, we wrote you on June 28th pointing out that you had twenty-seven pictures undated on your 1936-37 contract. In your letter of July 31st you state that you have all subjects under contract dated. It

is true that they have been dated since my letter of the [fol. 1379] 28th but the dates run into March, 1939.

"Now, if it is going to take you until March to complete your 1936-37 contract, it would not be good business for us to place out 1937-38 product with you at this time. If you want to change your dates on the 1936-37 product and play each picture as soon as available after first run we will be glad to negotiate a deal on our 1937-38 product for second run Hopkinsville."

Q. Now was there any provision in your contract for 1936-37 Metro pictures first run which provided that they were to be played off before March, 1939?

There was not. All those pictures have been played first run I think in the deal by May.

Q. Your understanding was that they had been played first run and the ones you had not bought had been played second run in Hopkinsville on the 1936-37 product?

A. That is right.

Q. I am calling your attention now to the provision in the contract that you were to play them off at the rate of three per month, and if there was any understanding of any sort that they were to be played prior to March, 1939?

A. There was not.

[fol. 1380] Mr. Wright: The next exhibit is Number 129, a letter from Mr. Anderson to Mr. Avey:

"I have your letter dated August 8. We will have no difficulty in working out suitable dates and I am ready to make a deal. Please advise. Kind regards."

The next exhibit is number 130, letter from Mr. Avey to Mr. Anderson, dated August 12, 1938:

"Thanks for your letter of August 10th. We are very happy to know that you intend working out suitable dates for our product and we look forward to receiving them."

The next number is Government's exhibit number 131, letter dated August 15th, 1938, from Mr. Anderson to Mr. Avey:

"It appears that for some reason you wish to write evasive letters—let's get down to cases.

"I shall be happy to work out suitable play dates when we make the contract. I am also interested in making a deal for the 1938-1939 product, second run. Please advise.

Government's exhibit. Kind regards."

Government's exhibit 132, dated August 17, 1938:

[fol. 1381] "Dear Mr. Anderson: Replying to your letter of August 15th, we are at a loss to understand why you say we write evasive letters. We have been very emphatic in all of our correspondence with you. We wrote you on August 8th pointing out that the way you were dating your 1936-1937 contract you would not complete playing that season's product until March, 1939.

"In order not to be a bit evasive—what we want to know is this: In the event we make a deal with you for our 1937-1938 product, second run, Hopkinsville, when would you agree to commence playing that product? And how many pictures a month would you agree to play?

Yours very truly."

Mr. Wright: I next read Government Exhibit No. 133, Anderson's reply to Mr. Avey, of August 18, 1938, as follows: (Reading)

"Dear Mr. Avey: Thanks for your letter dated August 17th.

"I believe that we will be able to play or pay, for all the product in question by June 1, 1939 or sooner if necessary.

Kind regards. Yours very truly. . . "

Mr. Wright: The next letter of August 22, Government [fol. 1382] Exhibit No. 134, as follows: (Reading)

"Dear Mr. Anderson: This will acknowledge receipt of your letter of August 18th in reply to ours of August 17th.

"Your letter certainly does not answer the last paragraph of our letter in which we asked when would you agree to commence playing and how many pictures a month would you agree to play. What we want to know is, in the event we sell you our 1937-8 product for second run, Hopkinsville, Kentucky, when will

you commence playing it and how many pictures will you play each month.

"Yours very truly . . ."

Mr. Wright: Now, if your Honor please, I would like to call your Honor's attention to this point, that at the time that last letter was written, the play-off record shows that Mr. Anderson had played then more Metro pictures than he was required to play; the contract required him to play three of them and he was then ahead of the contract provision.

The Court: That is Exhibit L-16?

Mr. Wright: Yes. The next Exhibit is No. 135, dated August 29, 1938, from Mr. Anderson to Mr. Avey as follows: (Reading).

[fol. 1383] "Dear Mr. Avey: I have your letter dated August 22.

I thought you would understand that I meant to work out the playing arrangement with you at the time we made the contract. I was, and am, willing to agree to any reasonable arrangement. You know the going is plenty tough in this situation and I need product badly. I can use your 1937-38 and your 1930-39 product, second run. I can use thirty pictures on each group and will be able to play five a month for twelve months ending October 31, 1939; this is disregarding the pictures that are now dated. If this is not satisfactory, I might be able to do some better.

Kind regards. Sincerely yours . . ."

Mr. Wright:

Q. At the time this letter was written was at the end of the 1937-1938 season, that season was then over, was it not?

A. Yes sir, just about.

Q. Did you get any reply to that letter?

A. What is the date of that letter?

Q. Show him the letter.

[fol. 1384] A. (Referring to letter) I don't remember whether I did or not.

Q. Well, at any rate, were the 1937-1938 or 1938-1939 ever offered to you for second run?

A. They were not.

Q. I call attention to this letter written October 17, 1938, and ask you if that is a copy of the letter you wrote to Mr. Dave Alterman, Vitagraph, Incorporated, at Atlanta, Georgia, on or about the date it bears?

A. Yes sir, that is the letter.

Mr. Wright: I will ask to have that marked with the next Government Exhibit Number, Government Exhibit No. 136.

(Copy marked Government Exhibit No. 138.)

Mr. Wright:

Q. I will show you a letter dated November 29, 1937, from you to RKO in Indianapolis, and will ask you if that letter was written by you on or about the date it bears?

A. Yes sir.

[fol. 1385] Q. Is this letter dated December 4, 1937, from RKO, a reply to your letter you referred to, your letter of November 29, 1937?

A. Yes it is.

Mr. Wright: I will ask that these letters be given the next Government Exhibit numbers, in the order of the dates that they bear.

(Letters marked, respectively, Government Exhibits Nos. 137 and 138.)

Mr. Wright: I now ask to have this RKO second-run play-off sheet, which was produced by RKO in answer to Interrogatory 16, marked with the next RKO Exhibit Number.

(Copy marked Government Exhibit No. 136.)

Mr. Wright: I offer in evidence letter to Mr. Dave Alterman, Vitagraph, Inc., Government's Exhibit No. 136, and which reads as follows: (Reading)

"Dear Mr. Alterman: I am submitting the following list of subjects to be booked which will complete my commitments at this theatre.

There is one thing I would like to have you do for me, that is, for you to apply the amount of film rental already paid on TOVARICH to another subject. I do not believe that TOVARICH is the right kind of pic-

[fol. 1386] ture for this town. You will note that I

have eliminated it from my bookings. Would also appreciate having the privilege of picking up some additional shorts later on. Your company has good shorts and I will need additional shorts soon * * *"

This statement at the bottom of the titles of pictures and dates I don't think are material.

The last paragraph says: (Reading)

"Kindly advise just how you wish to take care of the remittance already paid on TOVARICH; also, would like to know if your company intends to sell us this year's product, second run. I appreciate that we were slow in dating some pictures but you know as well as I do that Crescent Amusement Company was slow in dating frist run. Some of the dates that I have submitted to you in this letter were subjects that have not yet played first run.

Kind regards. Sincerely yours * * *"

Q. What were you referring to there?

A. I think that was 1938-1939.

Q. These booking dates refer to 1937-1938 product that you were just finishing playing?

A. Just finishing the commitment of that contract.

Q. These pictures that you were dating were also following the Crescent?

[fol. 1387] A. Yes, waiting the completion of first run before I could date.

Q. What were they; those that had been rejected on first run, those that you dated in advance of the first run, were they?

A. Yes. I don't think there were many like that though.

Q. (Reading) "I am enclosing an ad which appears in today's paper in which the Alhambra is advertising two-for-one. The admission is 14¢ Matinee; 23¢ Evening. What is this socalled gag about first run product being run for less than 15¢?"

Q. What was the ad you were referring to there?

A. That was a two-for-one that they had, some short subjects they were playing from Warners, some of the Warner products were being played that way.

Q. What admission were you charging for your second run on Warner product?

A. Second run, 25 cents.

Q. Did Warner Brothers ever offer you second run of the 1938-1939 feature product?

A. No sir.

The Court: The letter is addressed to Vitagraph, incorporated?

Mr. Wright: That Vitagraph, Incorporated, is a one hundred per cent selling agency of Warner Brothers of their own pictures.

[fol. 1388] Now, I offer in evidence Government Exhibits Nos. 137 and 138. I read the first letter, dated November 29, 1937, from Mr. Anderson to RKO Indianapolis, as follows: (Reading)

> "Gentlemen: Please advise by return mail if your product is available here, first or second run, features and short subjects.
>
> Very truly yours * * *"

I next read Government Exhibit No. 138, dated December 4, 1937: (Reading)

> "Dear Mr. Anderson: Replying to your letter of November 29th, kindly be advised that our product is sold in Hopkinsville first and second run to Mr. Sudekum.
>
> Yours very truly * * *"

Mr. Wright: I would like to have the RKO play-off sheet. What is the number?

The Clerk: RKO-4.

Mr. Wright: RKO-4 shows pictures played second run in Hopkinsville, that were released by RKO during 1937-1938 season, second run, Alhambra, Crescent house. It shows that 9 RKO 1937-1938 features were played under a contract made on November 19, 1937, and there were 8 more that were played under contract made in the year 1938, and the rest were unplayed.

[fol. 1389] Q. Mr. Anderson, you and your partners in the Hopkinsville Theatre sold to Crescent Amusement Company in November, 1938?

A. That is right.

Q. When was the first time any representative of that Company came around to see you about selling the theatre?

Mr. Waller: That is improper. Nobody has said that any representative came around. We object to the form of the question as leading and suggestive.

The Court: Did a representative of the Company come to see you?

A. Yes sir.

The Court: All right, go ahead.

Mr. Wright:

Q. Will you state when that was please?

A. I don't know the first time we talked about it but it was not when someone came to see me. I am not so sure when I started talking about the sale. They did come to see me, but I met them on the street first and talked to them.

Q. Who did you first talk to about a deal on the street?

A. Mr. McGowan.

Q. Mr. McGowan?

A. That is right.

Q. Who is he?

A. He is an official of the Crescent Amusement Company.

[fol. 1390] Q. What was his job?

A. I don't know exactly what his title is. He is one of the officials.

Q. Where was the conversation had with him?

A. In a restaurant next to the theatre.

Q. When was this?

A. I think it was early in the summer of 1938.

Q. What was said then?

A. Well, we talked about the theatre business for a while and during his conversation Mr. McGowan says something to the effect, did I think I would be better off by going back to the Company and disposing of the theatre. That was about all there was to it.

Q. Going back with what Company?

A. Crescent Amusement Company. At that time I told him I wasn't able to do anything like that because my partners were satisfied and I was satisfied and had too much money invested to just push it around.

[fol. 1391] Q. Then what was said? Did you have any further conversations with Mr. McCown?

A. Not for sometime after that.

Q. How much later?

A. I saw Mr. Baulch on the street, oh, sometime after that.

By the Court:

Q. About how long, he says?

A. Oh, it was during the summer of 1938. It is pretty hard to remember exactly, Judge, when it was. Anyway, I was talking to him on the street and he and I always had lengthy conversations and during this conversation something was said in reference to disposition of my theatre.

Mr. Wright:

Q. What was said? Do you remember the substance of the conversation?

A. He asked me if I didn't think I would be better off with that same amount of money invested elsewhere and I agreed with him that I probably would.

Q. Did you see him after that again?

A. Yes, sir, I saw him five or six times after that.

Q. And the same always occurred?

A. Always the same.

Q. How did you finally get to the point where you made arrangements to sell?

[fol. 1392] A. I hadn't intended to sell until up in November and I decided that it would be best if I did sell and get rid of one of my partners, take my money and get out of this situation, and bought one of my partners and get the business to myself, which was at Eddyville and Hartford.

Q. Who did you see and who did you talk to about making the final deal?

A. Mr. Baulch. When the final deal was made Mr. Baulch, Mr. Hayes and I believe Mr. McCown was present.

Q. Did you ever talk to Sudekum about it?

A. No. I believe I did see Mr. Sudekum during the summer and told him I had talked to Mr. Baulch but I didn't know whether anything would be worked out or not. Mr. Sudekum didn't say much about it. He just told me, well, perhaps Baulch would be back to see me and that is about all the conversation that was had.

Q. When was it you worked out the deal—was that at Hopkinsville?

A. Was it at Hopkinsville?

Q. Yes.

A. It was in Hopkinsville.

Q. When was that?
A. It was in November.
Q. What date, do you remember?
A. It was around the 21st or 22nd or something like that.
[fol. 1393] Q. Who was present then?
A. Mr. Baulch, Mr. Hayes and Mr. McCown.
Q. Who is Mr. Hayes?
A. He is an official of the Crescent Amusement Company.
Q. Do you know what his first name is?
A. Webb, I believe it is.
Q. You finally made a deal then?
A. That is right.
Q. What was the deal that you made?
A. Well, I agreed to sell my business for $15,000.00.
Q. That was about what you had in it?
A. Just about.

By the Court:

Q. What did that include, now, just the theatre?
A. That included the lease and all the equipment.
Q. Just the theatre in Hopkinsville?
A. Yes, sir.

By Mr. Wright:

Q. Now, at that time was anything said with reference to agreeing not to compete with them?
A. There was.
Q. What was the conversation about that?

Mr. Waller: That is objected to.
Objection overruled.

A. At the time that we talked and discussed the deal and [fol. 1394] agreed to terms, why, Mr. Baulch said something about they would like to have an agreement whereby I wouldn't enter into their towns in the future, and I said, "Well, that would be agreeable with me if they would make the same agreement."

By Mr. Wright:

Q. What was the agreement you worked out with respect to that?

A. Well, it was for a ten year period, we wouldn't enter each other's towns.

By the Court:

Q. Wouldn't compete against each other?

A. That is right.

Mr. Wright:

Q. Then was anything said at that time with respect to continuing operation or closing the theatre?

A. Yes, sir, that was. I wanted to run until the first of the year but Mr. Baulch thought that maybe Mr. Sudekum would rather close the theatre sooner, and he called Mr. Sudekum and after his conversation with him he told me that they thought it would be best to close sooner than that; they would like to close it, I think, the following week that we agreed upon.

Q. Did he tell you why?

A. Well, they didn't intend to operate the theatre.

Q. Then you stayed on and closed the theatre yourself?

A. I stayed on and closed the theatre myself.

Q. And is it still closed?

[fol. 1395] A. Yes, it is.

Q. By the way, did you bring a copy of that agreement that you would not compete with him?

A. No, sir.

Q. Do you have a copy?

A. I do have a copy of it, yes.

Cross-examination.

By Mr. Waller:

Q. Mr. Anderson, when you left the Crescent Amusement Company and opened the Kentucky Theatre in 1937, was that the first time that you had had any experience in dealing with these film distributing companies about films?

A. No, sir.

Q. You had previously been in the theatre business?

A. Yes, sir.

Q. Where was that?

A. Well, I have been in the theatre business for a good many years all the way from Missouri to New York.

Q. Then after you closed the Kentucky Theatre you continued in business in those other towns in Kentucky?

A. Yes, sir.

Q. Have you always found this MGM, Metro as hard to deal with as you did——

A. This year is the first time I ever made a deal with Metro.

Q. You have found them tough people to deal with?

[fol. 1396] A. Well, I have had difficulty making deals with them.

Q. You say this year is the first time you have ever made a deal with them?

A. Yes.

Q. You don't think the Crescent Amusement Company had anything to do with your failure to make deals, do you?

A. No.

Q. And you don't think the Crescent Amusement Company had anything to do with the trouble there in the Kentucky Theatre?

A. You mean on this Metro deal?

Q. Yes.

A. I wouldn't know if they did.

Q. Now, when you opened the theatre——

By the Court:

Q. Which deal are you speaking of that you don't think the Crescent Amusement Company had anything to do with the failure to make?

A. Well, I don't know as the Crescent Amusement Company had anything to do with the difficulty I had obtaining product in Hopkinsville. I mean, I have no way of knowing that they did.

By Mr. Waller:

Q. But you have always found them tough to deal with whether you were in towns where you had competition or had no competition?

A. You see, I have never been able to make a deal with Metro, speaking in Kentucky, until this year. At the time I operated the Kentucky Theatre in Hopkinsville I was [fol. 1397] operating the Eddyville Theatre and also Hartford and one of my competitors was buying Metro product, the competitor to me in Hartford is located in Beaver Dam, and I was never able to get the product away from him.

Q. Who was that competitor there?

A. A fellow by the name of Durham.

Q. Was he an independent? Or chain?

A. He was an independent.

Q. Now, in 1937 when you opened the Kentucky Theatre I believe you stated you had first run Columbia product, first run Paramount product, second run Fox product and second run Warner product?

A. Not when we opened we didn't.

Q. Well, shortly after that?

A. We opened with first run Paramount and first run Columbia and first run Grand National.

Q. And then shortly after you got this second run Fox and Warner?

A. That is right, selective deals.

Q. Now then, what about United Artists?

A. I didn't get United Artists until later. I think it was during the winter, January or February, sometime then. I know it was.

Q. Did you try to get it before then?

A. I think I did; I don't recall. They were selling that product, you see. At that time that product was sold to [fol. 1398] Crescent Amusement Company and the product that I later bought was 1937-1938 product which was not, they didn't start releasing it until September of 1937.

By the Court:

Q. You mean it was sold when you opened?

A. It was sold, the current product was sold when I opened.

By Mr. Waller:

Q. But eventually you got first run Columbia for 1936-1937, first run Paramount for 1936-1937?

A. Yes.

Q. And second run Fox for 1936-1937?

A. I think that was the 1937-1938. I don't recall but I think that was 1937-1938.

Q. You could have gotten 1936-1937 Fox?

A. I don't know whether it had been sold or not. I don't know whether it had been played.

Q. Now then, that second run Warner was 1936-1937?

A. I think that was 1937-1938, Warner was.

Q. Then you got first run United Artists for 1937-1938?

A. I got that very late in the season. I think that was around the first of February.

Q. And you had first run Columbia for 1937-1938 as well as 1936-1937?

A. That is right.

[fol. 1399] Q. And then did you make a deal with Columbia for the 1938-1939 product?

A. Yes, I think I did. I think I did right before I sold out.

Q. So with all of those deals that you had, you had enough pictures to keep your theatre running and changing programs three or four times a week?

A. Well, it was hard sometimes dating pictures when you didn't have any more than I had.

Q. But as a matter of fact you were able to do it and keep the theatre going?

A. I kept it open but I had to play a lot of pictures I shouldn't have played.

Q. You mean you had to play sometimes B pictures?

A. I had to play some C's, D's and E's.

Q. Now, the Crescent Amusement Company played some B pictures too, didn't they?

A. I imagine they did. They often do.

Q. And that was some of the occasions when they were having those Two for One nights, wasn't it?

A. No. They played some pretty good pictures Two for One; some mighty good ones, in fact. I would have been mighty glad to have had them for a twenty five cent admission.

Q. Now, all of these picture contracts contain clauses for [fol. 1400] minimum admission prices, don't they?

A. I believe they do. Most all that I have signed do.

Q. You never have signed one that didn't have such a clause?

A. I don't remember it.

Q. When you made this contract with Metro for the second run pictures in April, 1938 and agreed to maintain a minimum admission price of twenty five cents at night did you protest against that?

A. No, I did not because I thought that was a fair price. I thought they should get twenty five cents.

Q. You wanted to operate your theatre on a twenty five cent admission price?

A. Yes.

Q. And you never tried to get any of these companies to agree that you reduce the admission price?

A. No.

Q. Now, you were satisfied with the way things were going there with your theatre in the early part of 1938 when you first talked to Mr. McCowan?

A. Yes sir.

Q. It wasn't until the fall of 1938 that you made up your mind it would be better to get your money out?

A. That is right.

Q. And you did get your investment out of this, $15,000.00?

A. That is right.

[fol. 1401] Q. And you bought out one of your partners?

A. Well, what I did, you see, one partner that I had, F. L. May, had a one third interest in the Hartford and one third in the Eddyville, and Mr. Taylor one third interest in Hopkinsville only and by my disposing of the Hopkinsville enabled me to buy Mr. May's interest in the other two theatres and give both of those two situations to myself.

Q. So now you have four theatres in those small towns?

A. That is right.

Q. Did you deal with the Indianapolis Exchange on this Warner Brothers deal?

A. Yes sir.

Q. Do you remember the occasion when the Indianapolis Exchange manager made a deal with you on Warner product and the Atlanta branch manager made a deal with Mr. Sudekum on the same pictures?

A. I remember some confusion about it. The branch manager didn't make a deal with me on Warner product. The salesman made the deal with me.

Q. The salesman from the Indianapolis office?

A. That is right. They later told me they had a second run deal with Mr. Sudekum at the time this deal was made; the deal had been made out of Atlanta and they asked me to release them on that product and I wouldn't do it.

Q. Well, you got the product?

[fol. 1402] A. I got the product; that is right.

Q. Mr. Sudekum released it to you?

A. I don't know who released it. Anyway, I got the product.

[fol. 1403] The Court: What company was that with?

A. Warner.

Cross-examination.

By Mr. Frolich, For Columbia:

Q. Mr. Anderson, was Mr. C. P. Taylor connected with you?

A. Yes, sir, and still is.

Q. And still is; in 1937 was he your partner in the Rex Theater in Hopkinsville?

A. That is right.

Q. Would you recognize his signature if I showed it to you? (Exhibiting paper to witness)

A. Yes, that is it.

Mr. Frolich: I would like to put in evidence the contract between Columbia and C. P. Taylor for the 1936-1937 product.

Mr. Wright: This is for what theater?

Mr. Frolich: The Rex Theater.

A. That was changed to the Kentucky, Mr. Wright; it was [fol. 1404] formerly the Rex.

Q. I will show you a series of ten contracts for the 1937-1938 and the 1938-1939 product of Columbia, and ask you whether your signature is affixed at the foot of each of these contracts?

A. That is right.

Mr. Frolich: I would like to offer as a collective exhibit, these 10 contracts. (C.-40, from 1-10.)

Q. Now, Mr. Anderson, you knew that Columbia had been selling to the Crescent Amusement Company in Hopkinsville for the four seasons prior to 1936-1937?

A. Yes, but they didn't sell the 1936-1937.

Q. No; but I say for the four seasons prior?

A. Yes, that is right.

Q. And then you and Mr. Taylor obtained all of Columbia's product for the seasons commencing 1936-1937, and ending with 1938-1939, is that right?

A. That is right.

Q. And you played off and Mr. Taylor played off product for the 1937-1938 season?

A. That is right.

Q. Now, as to the 1938-1939 play off?

A. We didn't play all of them.

[fol. 1405] Q. And Columbia didn't bring suit against you for the money that you should have paid them under the contract?

A. No, sir.

Q. Columbia treated you very fairly?

A. Yes, sir, always has.

The Court: As I understand you, prior to 1936-1937, Columbia had been selling the pictures to Mr. Sudekum in Hopkinsville?

A. Yes, sir,—I think that is right, isn't it?

Mr. Frolich: That is correct. (Exhibit C-39 was offered)

Re-direct-examination:

Q. When was it with reference to the 1936-1937 licensing season that you were offered the 1936-1937 features?

A. I think the 1936-1937 features were, I think, in the end of September, 1936; we weren't in the——

Q. Everything had been licensed before you opened it?

A. No, sir, we didn't try to buy films until up in 1937.

Q. Now, the Warner 1937-1938 second run contract: Were you told by anybody that Mr. Sudekum had—What was said to you with reference to that contract as to Mr. Sudekum's activities, if anything?

A. Oh, you mean on that second run deal?

[fol. 1406] Q. Yes?

A. Well, after the deal was made, I was astounded that he even offered the product to me, and when he offered the product to me and we signed the contract I thought there was something strange about it at the time; and so a couple of weeks later they approved the contract by telegram, and I was up in the air; and I says, Here, I have the Warner contract anyway; and Mr. Schrader, a few days after that, told me that they had no right to sell the second run, that it had been sold out of Indianapolis and they had no right to sell it out of Indianapolis, and they wanted me to release it and I said no, I wouldn't release it; I couldn't release it then; he tried to get me to release it.

Q. You made a valid, accepted contract, didn't you?

A. Yes, sir.

(Noon Recess.)

[fol. 1407] Oscar A. Morgan, Called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. My name is Oscar A. Morgan; New York City.

Q. Your occupation, Mr. Morgan.

A. I am a Sales Executive of Paramount Pictures, Incorporated.

Q. Were you with Paramount Pictures on March 20, 1935?

A. Yes.

Q. In what capacity?

A. As General Manager of the Southern District in Atlanta, Georgia.

Q. I show you a telegram dated March 20, 1935, from you to William F. Bugie, Paramount Pictures, Memphis, Tennessee, and will ask you if you sent that telegram on or about that date, in the course of performing your duties as Southern District Manager?

A. I would say, yes.

Mr. Wright: I will ask to have the telegram marked as the next Government Exhibit.

(Telegram marked Government Exhibit No. 147)

Q. You were also employed by Paramount on October 1, 1937?

A. Yes sir.

Q. In what capacity?

A. In the same capacity.

[fol. 1408] Q. Southern District Manager?

A. Yes.

Q. I show you a letter from you to Mr. A. J. Barnard, Paramount Pictures at Indianapolis, dated October 1, 1937 and ask you if you wrote that letter on or about that date, in the course of performing your duties as Southern District Manager?

A. Yes sir, I wrote that letter.

Mr. Wright: I would like to have that letter marked the next Government Exhibit number.

(Letter marked Government Exhibit No. 148)

Q. You were also employed by Paramount Pictures on February 11, 1938?

A. Yes sir.

Q. In what capacity?

A. I think the same capacity at that time.

Q. I show you a letter from you to Mr. J. J. Unger, Paramount Home Office, dated February 11, 1938, and will ask you if you wrote that letter on that date, in the course of your duties as Southern District Manager?

A. Yes sir.

Mr. Wright: I would like to have that marked as Government Exhibit, the next number.

(Letter marked Government Exhibit No. 149)

Q. You were also Southern District Manager for Paramount on February 16, 1938?

[fol. 1409] A. Yes sir.

Q. I will show you a memorandum that you wrote, dated February, 16, 1938, with reference to Gallatin, Tennessee, and ask you if you wrote that on or about that date in the performance of your duties as Southern District Manager?

A. This is not a letter, it is a memorandum.

Q. That is what I described it as; your answer is Yes?

A. Yes.

Mr. Wright: I would like to have that given the next Government Exhibit number.

(Memo marked Government Exhibit No. 150)

Q. I will show you a letter dated August 6, 1938, from you to Mr. J. J. Unger at the Home Office, and ask you if that letter was written by you in the course of your duties as Southern District Manager of the Paramount?

A. Yes sir.

Mr. Wright: I would like to have that marked with the next Government Exhibit number.

(Letter marked Government Exhibit No. 151.)

Q. I show you a letter dated November 14, 1938, from you to Mr. J. J. Unger, at the Paramount Home Office and ask you if you wrote that letter on or about that date in the course of performing your duties as Southern District Manager?

A. Yes sir.

Mr. Wright: I will ask that that be marked with the next Government Exhibit number.

[fol. 1410] (Letter marked Government Exhibit No. 152)

Mr. Wright: I now offer in evidence this first Exhibit telegram from Mr. Morgan to Mr. Bugie, which has been marked Government Exhibit No. 147, for identification.

The Court: Don't you want to read it.

Mr. Raftery: If your Honor please, regarding this telegram, and the other exhibits, so that there will be no misunderstanding between the Government and Counsel on this side of the table; as we understand it, Mr. Wright, this evidence is being offered only against Paramount as a distributor, and not against any other distributor, whether the distributor is named as a co-conspirator or as a defendant. Specifically, what I mean is, this evidence is not being offered against either of the Universal, or United Artists Corporation, or Columbia Pictures Corporation?

Mr. Wright: That is correct.

The Court: It is offered, as I understand it, now, under the Government's theory that there was a conspiracy between the individual distributors and the exhibitors in this case, and not a general conspiracy among the distributor defendants.

[fol. 1411] Mr. Armistead: Of course, Crescent Amusement Company is going to object and does object to the introduction of these letters and telegrams referred to and already filed for identification, for the purpose of evidence in this case, on the ground that there was been no evidence of any conspiracy, between Crescent Amusement Company and the Paramount.

The Court: All right, let me hear the telegram and I will pass on it.

Mr. Wright: The telegram is dated March 20, 1935, to Mr. Bugie, Manager of the Memphis Branch, and states as follows:

> "Have made deal with Sudekum S-7, therefore void Paris contract and do not negotiate Brownsville or Union City. Writing Under"—This word, by the word "Under", it should be "Unger", is that right, Mr. Morgan?

Mr. Morgan: I think that is right.

Q. That word "Under" refers to Unger at the Home Office?

A. Yes.

Mr. Wright: (Reading continued) "Writing Unger requesting he wire approval. Will advise you. Regards." (Signed) "Oscar A. Morgan."

The Court: Overrule the objection.

[fol. 1412] Mr. Armistead: By your Honor's ruling do I understand that for the time being you overrule my objection? Or does your Honor think there is already sufficient evidence, prima facie evidence of a conspiracy?

The Court: Apparently this proof is offered for the purpose of proving a conspiracy.

Mr. Armistead: Yes, It is, therefore, not competent because there is no prima facie evidence of a conspiracy.

Mr. Wright: We don't concede that, your Honor. We say that that will show some prima facie case of conspiracy as between Paramount and the exhibitor defendants and that this evidence doesn't merely go to show the existence of the conspiracy but also goes to show what was done pursuant to it.

The Court: Well, conspiracy is a hard matter to prove all at once.

Mr. Wright: That is right.

The Court: I disagree with counsel that they have al-[fol. 1413] ready made out a prima facie case of conspiracy so far. There has not been a very strong prima facie case of conspiracy made out with the distributors, individual distributors, as the Court looks at it at this time but this evidence is now being offered, may or may not, I don't know what it will be, but it may be offered for the purpose of also proving the conspiracy.

Mr. Armistead: That is the reason we respectfully submit it is incompetent. There must be shown that there is a prima facie conspiracy before declarations of a co-conspirator are competent.

Mr. Wright: That is one of the ultimate conclusions your Honor will have to draw from the evidence offered in the case, as to whether there was or was not a combination between the defendant exhibitors and the Paramount. This telegram takes the product away from the exhibitor at Brownsville without giving him any opportunity to negotiate for it.

The Court: That may be pursuant to a conspiracy or it may not be pursuant to a conspiracy. I can't tell until I hear this. I will overrule the objection for the present.

[fol. 1414] Mr. Wright: The next Exhibit is Government's Exhibit No. 148.

The Court: Before you get through with 147, that was a telegram saying he had told Bugie to void the contract with whom?

Mr. Armistead: We are going to have to have those exhibits because I'm going to have to have them to cross-examine Mr. Morgan.

Mr. Wright: I would suggest this if you propose to cross-examine on these that you do it exhibit by exhibit and then we wont have that difficulty locating the exhibits.

Mr. Armistead: I couldn't very well do that.

Mr. Waller: Your Honor asked about what the tel-gram said. It says, void the Paris contract and don't negotiate the Brownsville contract. That is what is said as I recall.

The Court: Go ahead.

Mr. Wright: Government's exhibit No. 148 for identifi-[fol. 1415] cation is a letter from Mr. Morgan to Mr. Barnard, Paramount Manager at Indianapolis, which reads as follows:

"Re-Earlington S-10

Dear Mr. Barnard:

I wanted to add to my letter of yesterday regarding Earlington that you please don't do anything definite in this situation on S-10 without first taking it up with Mr. Reagan so he can discuss it with Mr. Unger. I write you at this early date because our deal with Mr. Sudekum is for five years and while he is satisfied to let the deal between Madisonville and Earlington stand as it is for S-9, we don't want to do anything to interfere with our negotiations with Mr. Sudekum for the remaining four years. Confidentially, Mr. Sudekum understands that our customer in Earlington has been playing these pictures for a long time and that we will still retain the right to sell him next year. However, the thing that Mr. Sudekum is objecting to is the matter of protection.

Sincerely yours."

I offer them in evidence.

Mr. Armistead: I think my objection is broad enough to cover all of these instruments.

The Court: Yes sir, it will be so understood.

[fol. 1416] Mr. Wright: Shall I proceed?

The Court: Proceed.

Mr. Wright: Government's Exhibit No. 149 is a letter dated February 11, 1938 from Mr. Morgan to J. J. Unger at the home office.

"In Re Gallatin, Tennessee.

"Replying to your letter of February 10th in regard to Gallatin, Tennessee, it will be absolutely necessary to include Gallatin in the franchise. If you will recall, Sudekum made an issue out of this in New York because even after we had started negotiating with him on the franchise Gallatin had been sold in July and we agreed to include Gallatin for the remaining four years in the total of his product for the Crescent circuit. Incidentally, Tony has built a big, new, beautigul theatre in Gallatin, Roth's old house is a pretty poor one and it is very doubtful if he will be able to continue against Tony's big proposition. For instance, he had a guarantee of $30.00 on Artists and Models, and High, Wide and Handsome, and he grossed $35.50 on Artists and $48.[illegible] on High and Wide. He had $30.00 guarantee on Double or Nothing, and grossed $60.40.

"Yours very truly."

[fol. 1417] Government's Exhibit No. 150 is dated February 16th, 1938, a memorandum from Mr. Oscar A. Morgan, and is marked "Confidential."

(Reading):

"Gallatin, Tennessee.

"Advised Sudekum on the 'phone that the Department of Justice was asking us why we sold our pictures next year and thereafter in Gallatin, Tennessee away from a man who had been our regular customer for years. Outlined the situation to Mr. Sudekum, who stated he was willing to do anything Mr. Unger and I felt was necessary, as he did not want to embarrass Paramount.

"Sudekum suggested that possibly the product could be split and it is my opinion that if a split could be arranged that we let Roth have first six months releases and Tony last six months.

"Advised Mr. Unger by 'phone today of the result of this conversation with Mr. Sudekum and it was Mr. Unger's opinion and my own that he should refer Roth to me and let me find out what it is all about and what is necessary to be done.

"Sudekum stated that Roth had a Fox franchise and that the only product Sudekum has bought for next year in Gallatin is Paramount. Also, stated that the Metro Manager went to see Roth and he wanted to buy only fifteen pictures.

"Oscar A. Morgan."

[fol. 1418] Government's Exhibit No. 151 is a letter from Mr. Morgan to Mr. J. J. Unger at the home office, dated August 6th, 1938, "In re. McKenzie, Tennessee:

With further reference to your letter of July 28, regarding the letter that Mr. Y. D. Moore, of McKenzie, Tennessee, wrote to Mr. Agnew. I have discussed the matter several times with Mr. Sudekum, and he insists that Huntington have protection over McKenzie.

I think there's a little bad blood, Joe, here, caused by certain unethical things that Mr. Sudekum claims have been done by the exhibitor in McKenzie, but be that as it may, I am attaching hereto copy of letter from Bugie, explaining about the situation.

As you can gather, McKenzie is not the only town affected by the clearance. As a matter of fact, several of these small towns over there, bought service, and paid us certain film rentals, when they found out during the S8 and S9 season, that Tony was not going to run pictures, and they got the benefit of it, and now that they have to play behind some of these Sudekum towns, they naturally put up a lot of resistance.

You will note that Bugie says he thinks he is getting this thing straightened out. I discussed it with him on this trip to Memphis, and he feels he is going to sell all of these exhibitors, probably a 10-picture outback.

[fol. 1419] Wouldn't it be the wisest course, therefore, to have Neil write Mr. Moore, and say that because of complications existing where there are a great number of small towns this way, that such matters have to be left mainly in the hands of the District Manager for decision, and that Mr. Moore will therefore understand the reason why Mr. Agnew is referring the entire matter to me, so that I can

advise Mr. Moore. Then I will simply wait a little while before I reply to Mr. Moore, until Bugie has a chance to see him and make a deal, which I think Bugie is going to do.

This will clear the matter up in the smoothest way possible.

Very truly yours, Oscar A. Morgan."

[fol. 1420] Government's Exhibit No. 152 is a letter from Mr. Morgan to Mr. Unger, reading:

"Nov. 14, 1938.

"In Re. Tim Smith Circuit

Dear Joe:

"With further reference to your letter of November 11th, regarding the TIM SMITH Circuit, and which letter crossed my letter to you of November 11th, in the mail.

"When you have returned to us the list showing the pictures on which the film depot has prints on S-8, we will then offer Tim Smith all the pictures on which we have prints.

"Now as regards the last paragraph of your letter about second runs, following shows the population of each town:

Morristown	5875
Harriman	3000
Newport	2753

"In any event, the only way we could sell second run, even if we wanted to in these particular towns, would be after Sudekum had taken the refusal, because Paragraph E of article 8, of the Crescent Amusement Company franchise, provides he can repeat any feature [fol. 1421] at a certain given price.

"We will keep you advised as to how we come out selling Tim Smith the first runs.

Very truly yours, Oscar A. Morgan."

[fol. 1422] Mr. Armistead: What is the date of that?

Mr. Wright: That is November 14, 1938.

The Court: Cross-examine him.

Mr. Armistead: Will your Honor indulge us about ten minutes so we can go over these?

The Court: Yes, we will have a short recess.

(Recess.)

Resumption.

Cross-examination.

By Mr. Armistead, for the Defendants Crescent et als.:

Q. Mr. Morgan, when did you first become connected with Paramount?

A. I think it was when they started the first picture, I think it was in 1915.

Q. Have you been constantly connected with it since that date?

A. With the exception of about 16 months, when I was with Harold Lloyd.

[fol. 1423] Q. When you were with whom?

A. When I was with Harold Lloyd.

Q. What positions have you held with that company?

A. Well, I started out in the shipping department; I think then I rose to salesman, salesman in the Philadelphia branch, Manager in Washington; went into the home office to publish the company paper; went into the theater department; from the theater department to Harold Lloyd, and back to Texas as sales manager; Philadelphia as branch, and in the Southeast as district sales manager; division sales manager for the South and part of the East; and now as salesman manager of short subjects and Paramount news.

Q. Now, what is the authority of a salesman—and when I ask what is the authority, I mean what was the authority from August 11, 1934 to August 11, 1939?

Mr. Wright: Excuse me just a minute. Now, if your Honor please, we brought this witness here for just one purpose, and that was to identify the fact that he wrote those letters and wrote them in the ordinary course of business. Now, to assume, while he is here, to save inconvenience and trouble to the defendants, if they want to use him to put in part of their case, if they want to, I think [fol. 1424] it should be understood, that when they are

doing so, it is as their witness and not the Government's.

The Court: Of course, as their witness, but not as on direct-examination.

Mr. Armistead:

Q. Will you answer that question?

A. Answer that question? Well, the salesman negotiates the contracts with the exhibitors, but he cannot close a deal; that is, he cannot approve the deal; it must be approved in the home office.

Q. Now, does that salesman take an application from an exhibitor?

A. The routine is that he negotiates with the exhibitor, writes up a contract, leaves the exhibitor a copy for himself; the contract provides that all approvals must be made in the home office, and the contract isn't valid until it is approved by one of the specified persons named in the contract.

Q. And is that stated in the face of the contract?

A. That is stated in the contract.

Q. Now, after that salesman obtains, we will call it an application, or as we say it is a contract—It is not a con-

[fol. 1425] tract until it is approved?

A. It is an application.

Q. Now, what does he do with that application?

A. He makes out his recommendation and forwards it to a branch manager, and the branch manager then looks it over, makes his decision as to whether he wants to approve it or not; the branch manager can approve it but he can't reject it; if he approves of it, he has the branch statistical department attach the necessary forms to it and sends it to the district manager's office.

Q. That is the district manager's office?

A. Yes.

Q. What does he do with it?

A. He has the right of rejection but not of approval but if he approves of it he adds his recommendation and sends it to the division sales manager.

Q. And does the New York office either approve or reject, is that correct?

A. That is correct.

Q. In other words, the New York office has the final say so?

A. That is correct.

Q. Now, has Paramount any uniform policy in selling pictures, or does it or not take into consideration the location [fol. 1426] of the theater, its appearance and conveniences, and the kind of management or financial ability of the exhibitor, his past record in carrying out his contracts, and the kind of product he has been using and whether or not he has been using the company's product in the past; do these elements enter into or have anything to do with getting the company to make a contract with the exhibitor?

A. Yes, decidedly so; because it has been our policy as long as I can remember for the representatives to place Paramount pictures to the best advantage of the company, the best representation for the company; and all those things and a great many more would enter into a decision as to who you would do business with.

Q. Now, have there been any instances where Paramount would sell a Crescent theater in some towns and would not be selling to it in other towns?

A. Will you repeat that, Mr. Armistead?

Q. Have there been instances where Paramount would sell its films to Crescent in some towns and not sell the films to it in all of its towns?

A. Yes, sir.

Q. In other words, sell some of the films to other exhibitors?

A. Yes, sir.

[fol. 1427] Q. Can you name some instances in which that occurred?

A. We sold pictures to Jack Crawford in Gadsden, Alabama, right up to the time Jack Crawford sold out to Crescent in Gadsden. We did business in Greenville right up to the time they sold out to Crescent. There were some other towns; I can't now recall.

Q. To refresh your recollection, do you remember Franklin, Kentucky?

A. In Franklin we sold the opposition.

Q. How about in Earlington, Kentucky?

A. In Earlington, Kentucky, we sold to the opposition right up to the time he went out of business.

Q. Now, you were questioned relative to Gallatin, Tennessee, and the proof in this case as given by Mr. Roth shows that after Crescent entered that town on or about

November 4, 1937, he made a complaint to the Department of Justice, and the department wrote Paramount, took the matter up with them; was that complaint or matter referred to you?

A. Yes, it was.

Q. At that time what position did you hold with Paramount?

A. District Manager in the Southeast.

Q. With headquarters in what city?

A. With headquarters in Atlanta.

[fol. 1428] Q. Now, did you investigate that matter?

A. I did.

Q. Do you recall about the year?

A. I think it was 1938 or 1939; I couldn't remember the exact year.

Mr. Armistead: Well, without waiving, may it please the Court, my objection to the introduction of the documents which were introduced when this witness was examined directly, I would now like to question him in regard to some of the correspondence.

Q. I hand you here a photostat of a letter dated February 21, 1938, addressed to Mr. J. J. Unger, New York, New York, and signed by W. F. Roth, and ask you if when you were making your investigation you discovered that original letter, of which that is a photostat or copy of it—No, the original?

A. If I recall, Mr. Unger referred the original to me and I sent it back to him, I think.

Mr. Armistead: We would like to introduce and have that letter marked Exhibit No. 67, I believe it is, to the defense evidence.

[fol. 1429] The Clerk: No. 48.

Mr. Armistead: No. 48, as evidence in the case. (So marked by Clerk)

Mr. Wright: If the Court please, it is a letter from Mr. Roth to Mr. Unger; I think it should have been offered at the time Mr. Roth was on the stand.

The Court: Yes; if it is offered for the purpose of proving any of the facts contained in the letter, of course it is not competent at this time.

Mr. Armistead:

Q. Wasn't this a letter sent to you in Mr. Unger's letter to you?

A. Yes, there is another letter from Mr. Unger in which he sent the letter to me and requested me to investigate it.

Mr. Armistead: May it please the Court, I think that would be competent if the Justice Department made a complaint and this witness began to investigate and found those letters.

The Court: For what purpose do you wish to introduce the letter?

[fol. 1430] Mr. Armistead: To show that he investigated the matter and made a conclusion, and he had to have those letters before he could make a conclusion as to whether or not the complaint of Mr. Roth was justified, and it would explain the evidence put in by the Government; I am trying to make a picture of what occurred up there; and this correspondence that I want to introduce would just give a complete picture of it.

The Court: Well, let me see the letter. (Court examines the letter.)

[fol. 1431] (Passed to the Court.)

The Court: As I recall Mr. Roth testified something about a letter of this kind.

Mr. Armistead: Testified about correspondence passing between him and the Company.

The Court: This letter also mentions receipts from Artists and models that were introduced, on direct testimony, in some documents—bring me those yellow sheets on my desk. Well, I saw Mr. Roth here in the court room this morning. You can get him as a witness if necessary.

Mr. Wright: This is just to show that a matter came to his attention, we have no special objection, but it is not material.

The Court: I do not think this is very material anyway, you have introduced some evidence in connection with this particular matter with this witness.

Mr. Armistead: This letter is as follows:

[fol. 1432] "It is dated February 21, 1938, Mr. J. J. Unger, "In reply to yours of the 17th, wish to advise you that I will not be in Atlanta any time soon,

as I have only made this trip three times in the last twenty years.

"As you know, I've been a consistent user of Paramount pictures for around 20 years and during that time have paid you plenty in overages and our relations have been very pleasant. I haven't asked any favors of you for quite a number of years, but am going to lay the cards on the table and think that you will agree with me that your product this year has been below par with the rentals higher.

"I am listing the pictures used along with rental and receipts for the engagement.

(Then there is a list).

"I discussed this with Mr. House when I was in Atlanta, but he seemed to think that the product was holding up satisfactory. Naturally, I've been in the business too long to think that; in fact, I have some product at $17.50 and $18.00 that has grossed more in one day than the above pictures have in two days and it wasn't on a Saturday.

Please check the above figures over and let me know what you think would be fair in the way of adjustments.

[fol. 1433] "Awaiting your valued reply, I remain,

Yours very truly (Signed) W. F. Roth."

The Clerk: Defendants' exhibit Number 38.

Mr. Armistead: There is another letter which I now hand you a photostat of, and ask you if you received that letter, which is dated March 10, 1938, from Unger to you? (Passed to witness.)

A. Yes, sir.

Mr. Armistead: Now this letter is as follows:

"Dear Oscar: Will you please advise me immediately if you have sent your salesman or Manager to Gallatin, Tennessee, to see Mr. Roth and make a deal for next year for half of Group S-10?

"I am also attaching hereto copy of letter received from Mr. Roth which indicates that he is losing considerable money on our product. Be sure that someone investigates this when negotiating a deal."

Q. Is that the letter that this February 21st letter refers to?

A. Yes, sir, that is the letter. I was under the impres-
[fol. 1434] sion that he sent the original letter back to him.

Mr. Armistead: We offer that letter in evidence as Defendants' Exhibit No. 49 to this proof.

Q. Now on March 14, 1938, did you write Mr. Unger as per photostatic copy which I now hand you?

A. Yes, I wrote that letter.

Mr. Armistead: Defendant offers that in evidence as defendants' exhibit No. 50.

Mr. Wright: If the Court please, it is obviously a self-serving statement written by Mr. Morgan here after the investigation got underway. I do not see that it is of any probative value.

The Court: Let me see the letter.

Mr. Armistead: It ought not to be objected to. All these photostats that I am offering in evidence, I think the Government will agree are photostats that were made when they went through Paramount's files, and made at our expense and furnished them a copy of them; is that correct?

[fol. 1435] Mr. Wright: That is correct.

The Court: Overruled. (Marked Defendants' Ex. No. 50.

Mr. Armistead: Now this is as follows: Dated March 8, 1938, signed by you:

> "Replying to your letter of March 10, in regard to Roth at Gallatin, Tenn., I am attaching hereto copy of letter from Mr. House to me on his visit there.
>
> "Briefly, House tells me the exhibitor absolutely would not commit himself as to whether he would take a split of the product, or whether he would even be willing to pay the same price for S-10 as he is paying for S-9. House says that Roth had his guard up completely and kept talking about waiting thirty days before discussing anything. House believes that Roth is trying to be cunning to force us to come to him with a direct proposition.
>
> "My instructions to House were to approach Roth on the basis that we had sold the product to Sudekum, but that we might see what we could do in regard to getting him a split. He refuses absolutely to commit himself. In fact, House said he was extremely non-committal about everything except that he wants a re-

[fol. 1436] duction on his present contract. Of course, I think, or rather I know, that his receipts must be very badly affected, because of Sudekum's new theatre.

"I plan to be in Nashville the end of next week and I think I will just borrow a car from Tony and drive over to Gallatin myself. I want to *fo* over the franchises with Tony completely before returning them to you.

"House's personal opinion of this Gallatin situation is that we should go right ahead and make our deal with Sudekum and forget Mr. Roth. He says he does not like Roth's attitude, nor the fact that he seems to think Paramount should lead the way and give him all of our pictures.

"It is just a question of policy, and I personally feel that the most we should do is split the product.

Yours very truly."

Now then on March 11, 1938, I will ask you if Mr. House wrote you a letter, photostat of which I now hand you?

Mr. Wright: If the Court please, we now have it offered [fol. 1437] here through this witness, the letter from Mr. House and I think we ought to have the same opportunity to cross-examine Mr. House, before any of his letters go in, to the same extent that Mr. Armistead has.

The Court: Yes.

Mr. Armistead:

Q. I hand you that letter, he doesn't know the purpose I am handing them to him for, to refresh his recollection if I can, if he can answer this next question I am fixing to ask him.

The Court: All right.

Mr. Wright: I think it will appear later, if the Court please, that this witness does not need any refreshing, because he has been around here two days being refreshed.

Mr. Armistead: He must have had the FBI around.

The Court: Why do you not ask the question?

Mr. Armistead:

Q. Did you offer Roth a split deal?

[fol. 1438] A. Decidedly, yes.

Q. Did he accept it?

A. No.

Q. What do you mean by a split deal?

A. A split deal is a very usual thing in this business, where there are competitive theaters and where both are customers, have been old customers of the company, that a fair division of the product is offered to both of them, and usually accepted, like this exhibitor, where there is a split deal, they themselves know in advance what picture he is going to get so he can advertise it ahead of time. Prior to the consent decree in the case he kept his program ahead, in fact it would be a rather foolish policy to do that, it would be dangerous to make pictures a year in advance and then find the public tast- had changed, therefore production was curtailed and for months. However, he would know this, the ow-er of the split deal therefore was well known, where distributors would announce, and would announce prior to the agreement would be to come in between the exhibitors, the fact that the exhibitors would split the product into two blocks with an equal interest, because one exhibitor would make the selection in that manner and the other the other time, one would select product for two months, split it, and the other exhibitor would make the choice, and then on the other two months the other exhibitor would make the division, and this exhibitor would select, and that would give a satisfactory split. [fol. 1439] Q. In other words, it was the purpose then to give each of those two exhibitors the same basis?

A. That is correct.

Q. On an equal basis?

A. Yes.

Q. Now, did you ever go over there to Gallatin?

A. Yes.

Q. Have you ever been in Mr. Roth's theatre?

A. Yes.

Q. Did you ever see pictures of the interior and exterior of the Crescent Theatre there?

A. I have seen the Crescent.

Q. How did those two theatres compare in appointment and appearance?

A. Well, I think it would be a little unfair to compare them. Mr. Roth's theatre is one of the most inferior theatres in the South; it was at the time when I saw it.

Q. Well, did you ever have any trouble with Mr. Roth in getting him to play his pictures?

A. Yes sir, we did.

Q. Do you remember any instances?

A. Yes sir, I do. When Mr. Sudekum had built his theatre in Gallatin and we were not serving Mr. Sudekum but serving Mr. Roth, and Mr. Roth quit playing our pictures [fol. 1440] and advised us that he would not complete the contract until we gave him an adjustment. We advised him that he had a contract, and he stated that did not make any difference, he wouldn't play any more pictures until he got an adjustment and he stopped playing the pictures for, I believe for about three months, until we sent Mr. House up there to look into the matter, after receiving a letter from Mr. Unger, that you introduced.

Q. As I understand, Mr. Roth had the 1937-1938 product?

A. Do you mean—Is it all right if I refer to a list?

Q. Yes.

A. We have a trade number for this product and we refer to it as S-so and so, we don't use the year. I can remember by the number instead of the year.

Q. I think you will find that to be S-9?

A. We served Mr. Roth with S-9, that is correct, 1937-1938.

Q. When did he finish playing S-9?

A. He finished playing S-9, I think in 1939, March 1939.

Q. Well, did you give Mr. Roth an adjustment?

A. Yes.

Q. When did you give him that?

A. We gave him that right shortly after the date of Cecil House's letter, which I think was March 11, 1938.

Q. Somewhere along in there?

A. Just a few days later; we gave him an adjustment on all the remaining pictures, a very substantial cut.

[fol. 1441] Q. Was there any provision in his contract requiring the Paramount to make that adjustment or to give him an adjustment?

A. No sir, none whatever.

Q. I will ask you if it is true—Well, in fact, it is admitted that the Paramount had been selling Mr. Roth for a long number of years and that finally there was a franchise made with Crescent. Now, Mr. Roth had that 1937-1938 product, that is, S-9, and I will ask you if it didn't continue to sell Mr. Roth, if you don't continue to sell Mr. Roth Paramount's product after Crescent entered, that is, after

1937-1938, after Crescent entered Gallatin on November 4, 1937?

A. Yes sir, we did.

Q. Now, when did Paramount first sell Crescent in Gallatin, Tennessee, and why.

A. Well, when we were negotiating a five-year franchise, which started with S-9, which was the season of 1937-1938, and having been advised that Mr. Sudekum was going to go into Gallatin and not knowing when, we went ahead and made an S-9 contract with Mr. Roth, that is, 1937-1938. That was the first year in the franchise. And we felt, however, inasmuch as it was uncertain at that time, when we were negotiating with Mr. Sudekum, when he would start, we felt free to go ahead and sell Mr. Roth. Mr. Roth ran those pictures, as I say, and did not complete the contract until March 1940.

Q. You mean, 1939?

[fol. 1442] A. 1939, yes, and Mr. Sudekum didn't start until the second year's product in that franchise as compared to his other towns. He didn't start until S-10, which he started to play if my memory is right, and I could refer to the same record that the Government has had access to, if my memory is right I think he started to play in the last part of September of 1939, Mr. Sudekum did, after Mr. Roth should have completed his contract in November of 1939.

Q. You mean, 1938, don't you?

A. I mean, 1938, pardon me. That is right.

Q. Now, there was just a four-year franchise, then, to Gallatin?

A. That is correct. And we went ahead and sold that year to Mr. Roth, then we offered him a split for the remaining four years. We didn't offer him a four-year deal, I don't want that misunderstood, but we offered him a split on S-10, which is 1938-1939, and felt satisfied from that point on, year by year, we could offer him an equal division, and he rejected it. Incidentally, he could have——

Mr. Wright: If the Court please, we object to what he says they were satisfied to do. The question is, whether they did offer him that.

A. We did offer Mr. Roth a split of the 1938-1939 pictures, and he rejected it.

The Court: You didn't offer him a split on any after [fol. 1443] that?

A. No sir.

Mr. Armistead:

Q. Now, does Paramount have any pride or desire to get in the best equipped theatres in a community, generally?

A. Well, it is perfectly natural with the men in the Home Office, who certainly can't know every city in the United States, that is left to their men in the field and those men in the field, certainly I feel, and I have felt I owed an obligation to the officers and the stockholders of the Company to place its pictures most advantageously in any situation.

Q. Now, then, we are going to come to Brownsville, Tennessee. I believe I asked you whether or not Mr. Roth played his pictures on time, and you said that 1937-1938 product he finally completed playing in March 1939, when he should have completed them in the Fall of 1938, is that right?

A. That is right.

Q. Did that influence you or have anything to do with or one of the reasons you saw fit to give the product to Crescent.

The Court: He had already given it to Crescent.

A. No, there is a point in there that ought to be brought out Mr. Roth asked thirty days in which to make his decision as to whether or not he would accept a split. In that thirty days, we gave him the adjustment, and he waited [fol. 1444] sixty days before he advised us he would reject the split. In other words, we gave him sixty days instead of thirty days, and in that time he got the adjustment, and he started playing the pictures, then along somewhere in April he played, he played one in April, and dropped out until March, 1939.

Q. In Brownsville, Tennessee, C. G. Lawing was the regular customer of Paramount?

A. No, I could hardly say he was a regular customer. He was what is known in the trade as an In-and-Out.

Q. When did he make the first deal with Paramount for its product?

A. I couldn't say that without looking at the records again.

Q. Well, to refresh your recollection,——

A. I think I can remember. I think I will have to refer to those years again. I think he made a deal the first year on 1932-1933. Tehn the following year he did not make a deal, if I remember right, that is for S-5.

Q. Now, let's go to this 1932-1933. Did Mr. Lawing play all of his pictures and shorts?

A. No, he did not.

Q. Or were some of them cancelled?

A. We had to cancel quite a few pictures.

Mr. Wright: Certainly there are records which will show exactly what kind of deal was made and what cancellations [fol. 1445] there were, if that is material to the case here. Mr. Morgan, I think, is testifying from memoranda there that he has that somebody else has handed him.

A. No, it is just the years.

Mr. Wright: Yes, the paper that was made up from records made up by the Company.

A. This is just to identify the trade name of the year. We have S-4, that would be 1932-1933; S-5 would be 1933-1934. I don't remember each of those years that far back.

Mr. Wright: I understand, but you are not compelled to refresh your memory to state what you did with exhibitors back in those years; you have a record of that.

A. Yes.

Mr. Armistead:

Q. You have examined your records upon which your answer is based.

A. Yes sir.

Mr. Wright: I think we are entiled to have the records of that, if it is material to this.

The Court: What is the year in question?

A. 1932-1933.

Mr. Armistead: I am trying to see whether he was a regular customer of the Company and whether he played [fol. 1446] out his contract.

The Court: Whether he played them out, all the pictures, Mr. Morgan testified that he had been a customer and that the Company cancelled a whole lot of them.

A. That is right.

The Court: Do you have records for that?

A. Yes, sir, we have records, and the Government had access to them, to those same records.

The Court: That is the best evidence.

Mr. Armistead: They have had access to the same records and it looks like it is fair for this witness to testify, when the Government has had access to every record the Paramount has.

Mr. Wright: We didn't undertake to examine any records back to 1932-1933 at all. If they want to bring them in, we will be glad to do it.

The Court: Is it very material what pictures he played or what pictures he didn't play, in 1932? That is, as far as the pictures are concerned.

Mr. Armistead: I just asked if he played all the pictures, and all the shorts?

[fol. 1447] The Court: You say you can examine the record?

A. Yes.

The Court: Do you know whether he did play all the pictures and all the shorts, under the 1932-1933 contract?

A. No sir, he did not. We have a record he cancelled quite a few, and before we could make him another deal, he insisted that we cancel those pictures.

The Court: All right.

Mr. Armistead:

Q. Now then, did you sell him in 1933-1934, that is S-5 product?

A. Well, we sold him in this way. The salesman couldn't make a deal with him that year, we stayed out the whole year. They went back the following year, in order to make a deal for S-6, that is for 1934-1935 and in order to make that deal, he insisted we include a clause in the deal, which was for 52 pictures, we should give him the right to make that selection of 52 out of both years product, over a hundred pictures.

[fol. 1448] Mr. Wright: If your Honor please, I don't think this gentleman carried on the negotiations with Mr. Lawing at all. At least, it doesn't appear. Were you the man that had the negotiations?

A. No. But I got the recommendations from the branch office. We made them for the next year.

Q. Whatever recommendations were made will appear on the records?

A. Yes sir, that is right.

Mr. Raftery: Mr. Lawing testified to this. Mr. Lawing testified on direct examination that he had the right to select them out of two years.

Mr. Armistead:

Q. Have you those original records here with you?

A. I don't think I have.

By the Court:

Q. What position did you occupy at that time?

A. I was district manager for the southeast.

Q. Did those records come before you?

A. Yes sir, they had to come to me first before they went into New York and I had to pass on them.

The Court: I didn't quite understand the answer that the [fol. 1449] witness made to the answer.

Mr. Armistead: I understood he said the deal was made for the 1934-1935 product.

Mr. Wright: He went further than that and he undertook to say what Mr. Lawing had insisted upon. Now, obviously he is not competent to say what Mr. Lawing insisted on when he made that deal with whatever salesman. The only person that could testify to that would be the man who negotiated the deal with Mr. Lawing on behalf of Paramount.

The Court: Well, I don't know. The records would come before him as district manager pertaining to that matter.

Q. How did you get your information as to what Lawing insisted upon?

A. Well, it was in the recommendation written on the form that is used, attached to the contract that comes from the branch office to me, and if my memory is correct, that recommendation said that in order to make that deal we had to make it include two products.

Mr. Armistead:

Q. I will ask you this question. Is it customary or was it [fol. 1450] customary for Paramount, in selling one year's product, to volunteer to the exhibitor the right also to choose from the preceding year's pictures?

A. No, hardly.

Q. When is that done?

A. It is only done as a last resort when late sales are made and the exhibitor has enough buying power to force such a situation or insist upon it.

Q. Now what kind of theatre in appearance was Mr. Lawing operating in Brownsville, Tennessee?

A. Well, I was in the theatre once some time prior to the time Crescent built there and if I remember rightly, it is a very poor theatre and having somewhere less than two hundred seats. And I remember it because it was unusual in this respect, it was one of the few remaining theatres in the country that has the screen in the front instead of in the back. In other words, you enter the theatre and the screen is in the front and you have to walk to the back and face the screen, but it was a very poor theatre.

Q. Did you ever go in the Crescent theatre at Brownsville?

A. No, I haven't but I have seen pictures.

Q. Have you seen pictures of the exterior and interior?

A. Yes sir, I have and we have had report from our own men as to the quality of the theatre, which is our practice.

Q. Now, did Crescent make a deal for the 1935-1936 product of Paramount in Brownsville, that is, S-7?

[fol. 1451] A. Yes sir, they did.

Q. What was the reason, if any, that the contract was made with Crescent rather than with Mr. Lawing?

A. Well, it was my opinion and the opinion of the branch manager also that we weren't obligated to Mr. Lawing in view of our experience with him in Brownsville and we saw no reason why we should not make a contract with Mr. Sudekum, for that reason, and the fact that we would be in a more representative theatre.

Q. Well, did the fact that Mr. Lawing hadn't played out his pictures for the preceding year and some pictures were cancelled have any effect?

A. Yes sir, it would have an effect. He was not considered a good customer.

Q. Now, I am going to come to the Earlington, Kentucky situation. Mr. Dozier was——

Mr. Raftery: If your Honor please, that witness did testify to that on page 809. In answer to a question he says: "Your contract for 1934-1935 was based on playing some of the previous year's product." And the answer: "It was for the year's release of pictures but it was out of two years. In other words, I had the privilege of playing whatever the total number of pictures was out of two years' product." That is Mr. Lawing's testimony.

[fol. 1452] By Mr. Armistead:

Q. Now, Mr. Morgan, my attention has been called to the fact that I didn't ask you regarding Government's Exhibit No. 147, which is a telegram dated March 20, 1935 from you to Mr. Bugie. When you sent that telegram did you have in mind the reasons that you just have given here? The telegram: "Have made deal with Sudekum for S-7 therefore void Paris contract and don't negotiate Brownsville or Union City." Did you have those reasons in mind as far as that is concerned?

A. As far as Brownsville is concerned, yes. As regard to just that and the use of the word "void", if I remember correctly—there is no correspondence on this—the branch manager advised me on the phone that he had contract with Union City. Now, the exhibitor understands that none of our contracts are contracts until they are accepted. They are applications, and I merely told him "void". What I meant by that "void" was to advise the exhibitor that we can't accept the contract.

The Court:

Q. Did you reject it?

A. It is a rejection. Void is the word, but we can't tear it up because the exhibitor would have to be notified.

Q. What is the date of that telegram?

Mr. Armistead: March 20, 1935, just about six weeks before Mr. Lawing opened his tent show in Paris.

[fol. 1453] Q. Now, in regard to Earlington, Kentucky, are you more or less familiar with that situation in Earlington and Madisonville?

A. I was pretty familiar with it and I refreshed my memory so I would be more familiar with it.

Q. Mr. E. W. Dozier was operating a theatre in Earlington, Kentucky. For what years did Paramount sell him its films?

A. Sell who?

Q. Dozier.

A. Well, I don't know what year Dozier started in Earlington but we sold him pictures every year right on up to the time he made some kind of deal and sold to the Crescent Amusement Company.

Q. Did you seel him first run Paramount pictures in the town of Earlington, Kentucky all the time that you were selling him?

A. First run in Earlington, yes.

The Court: He opened May 12, 1932 in Earlington.

By Mr. Armistead:

Q. Were you selling Crescent in Madisonville during that time?

A. We didn't sell Madisonville for the first three years that Mr. Dozier operated in accordance with his Honor's date he just gave me when they opened. We sold Dozier S-4, S-5 and S-6, that is, 1932-1933, 1933-1934 and 1934-1935 and we didn't sell Crescent anything at any of their situations for those three years.

[fol. 1454] Q. How about 1935-1936, did you seel Crescent at Madisonville then?

A. We sold Crescent at Madisonville 1935-1936. We also sold the product to Mr. Dozier in Earlington and he ran it. We then didn't sell Crescent in 1936-1937 and Mr. Dozier had the product again. We sold Mr. Sudekum for 1937-1938 but in some manner the contract was made with Earlington for that year with clearance over Madisonville and that contract was approved before I had finished negotiating the contract.

Q. Well, did Dozier for that year then have clearance over Madisonville?

A. Yes sir. I was getting to this point that I would like to point out, that the years, the first three years that Mr. Dozier operated we didn't sell Madisonville and therefore, he enjoyed automatically clearance over Madisonville, al-

though I don't know whether any clearance was express in his contract. I haven't seen those particular contracts. The year 1935-1936 we sold Madisonville with prior run, I believe it was, over Earlington. We sold it to Crescent and were advised by the Indianapolis office that their agreement with Mr. Dozier if and when we sold Madisonville they would have to reduce the Earlington contract, which was done, and he completed that contract. The following year he again enjoyed automatic clearance over Madisonville because we didn't sell Crescent. The following year, S-9, 1937-1938 he contended he had a contract with prior run [fol. 1455] over Madisonville with no understanding that he would get an adjustment and we finally agreed to let him play that product ahead of Madisonville and Madisonville played the first year of its franchise seven days back of Earlington.

Q. In other words, that was just a four year franchise insofar as Madisonville was concerned?

A. That is correct. It amounted to that. It amounted to four years. We also sold Mr. Dozier the following year's product, S-10, 1938-1939 to play behind Madisonville and it was during that year, I believe, that he made his deal with Crescent, I think.

Q. Now, did you ever hear of Buchanan down here at Athens, Alabama?

A. Athens, Alabama?

Q. Yes sir.

A. Yes sir.

Q. Did you sell Buchanan any product?

A. Yes sir, we sold Buchanan twenty one pictures.

Q. What year?

A. I don't remember the year. It was the year he came in. He came in just a few weeks, I think, after he had decided to put a theatre in. I had known Mr. Buchanan for many years and he wanted to buy the pictures that Mr. Rosenbaum didn't use, that is, the eliminations that he had under his contract and we sold him twenty one pictures.

[fol. 1456] Q. How many did he play?

A. He played one.

Q. Did he ever give any excuse why he didn't play the rest of them?

A. He just refused to take the pictures, refused to answer letters and told the salesman that he had plenty of pictures and that he had tried one of the pictures——

Mr. Wright: If your Honor please, we object to what he told the salesman.

Objection sustained.

By Mr. Armistead:

Q. Anyhow, he didn't carry out his contract?

A. He did not. He still owes us money for the twenty pictures.

Q. Now, we are going to come to Tim W. Smith. Did you ever hear of him before?

A. Yes sir.

Q. Peerless Enterprises?

A. Yes sir.

Q. Smith, in substance, testified, that in 1938 he was trying to buy some Paramount product for Morristown, Harriman and Newport and he was informed that under the franchise, some salesman or representative of Paramount informed him that under the Crescent franchise that Crescent was entitled to those second run, if they desired them. Now, I want to ask you first, before I get to that if Para- [fol. 1457] mount did offer Peerless Enterprises pictures to be exhibited in Morristown, Newport and Harriman?

A. Yes sir, we did.

Q. That is, for the unplayed S-8 features and some unplayed S-9 features?

A. That is correct.

Q. Did Paramount ever make a contract with Peerless?

A. I don't think we made a contract in those towns. I don't think he wanted any of the pictures.

Mr. Wright: I move to strike that last.

The Court: Yes.

By Mr. Armistead: Well, he was the head man in the southeast, here, may it please the Court.

By the Court:

Q. Well, did you have any application from him for those years?

A. I can't remember without looking at the records.

By Mr. Armistead:

Q. I will hand you a list of pictures and ask you if this list of pictures were offered to Peerless Enterprises for those towns?

A. Yes sir, this is the list. That is definite. He sent this list to the home office and asked to check off the pictures [fol. 1458] that they had prints on and they checked them off. We offered those pictures to Mr. Smith.

[fol. 1459] Q. I will ask you if those pictures were not offered to Smith prior to the time that you knew any complaint had been made by him to the Department of Justice?

A. Yes sir.

Mr. Wright: Well, that is a conclusion; I think we would get out a little better if counsel would ask him what he heard offered and what he heard of the complaint.

The Court: Yes.

Mr. Armistead: He can clear that up, may it please the Court, by examining him. I asked him if he ever offered those pictures to Smith before Smith ever made complaint to the department.

The Court: When did you offer them to Smith?

A. I don't know.

Mr. Armistead:

Q. Did you ever offer those pictures to Mr. Smith before Smith made complaint to the Department of Justice?

A. No; I have inspected some correspondence yesterday that showed that it was made prior to that time.

[fol. 1460] The Court: You say you inspected some correspondence?

A. Yes, sir.

Mr. Armistead:

Q. You used the word "inspected"?

A. Inspected.

Mr. Wright: If the Court please, as to whether the correspondence shows that or not would appear only from the correspondence itself.

The Court: Yes.

Mr. Armistead:

Q. I hand you a copy of a letter dated November 17, 1938, and addressed to Mr. Tim W. Smith, and ask you if you deposited that letter in the United States mail addressed to Mr. Smith, at Knoxville, Tennessee?

A. Yes, sir, I wrote that letter; those are my original initials on it.

The Court: Dated November what?

Mr. Armistead: November 17, 1938.

Q. Now, having seen that letter, does that refresh your [fol. 1461] recollection as to whether or not at that time you knew Smith had made complaint to the Department of Justice?

A. I don't think he had made any complaint; I didn't know of any complaint at that time.

The Court: When did you hear of the complaint?

Mr. Armistead:

Q. Was it after your letter of November 17th?

A. It was after that letter that I was advised.

The Court: All right.

Mr. Armistead:

Q. Now, Mr. Morgan, you spoke of a franchise you had, that Paramount had, with the Crescent Amusement Company; what is the purpose of a franchise?

A. Well, the general purpose of a franchise is to insure an outlet for your product for a period of years where you might have some doubt that you would have that outlet, and to have that outlet with a satisfactory deal for yourself with the distributors.

Q. Is the purpose of a franchise to freeze out any independent?

A. Definitely no.

Mr. Wright: Will you repeat the question?

[fol. 1462] The Court: "Is the purpose of a franchise to freeze out any independent?" He says "Definitely no."

Mr. Wright: I object to that; that is one of the things we are trying to find out in this lawsuit.

A. The answer is still no.

The Court: Well, he is speaking generally; the question in this case is whether this particular franchise was executed for that purpose or not; that, of course, is for the Court to decide.

Mr. Armistead:

Q. What led up to or what caused this franchise between Paramount and Crescent?

A. Well, we had been out of the Crescent Amusement Company for three years. We were able to make a deal on S-7; we were out again the following year; and we thought it best to try to negotiate a franchise in order to ensure ourselves that we would have a definite and continuing outlet for our pictures at the proper terms.

Q. Well, do you recall the date of that franchise? It has been made an exhibit here.

A. I don't remember the date just now; yes, I have got [fol. 1463] the dates here, pardon me, I have got them written down. Negotiations were started in October, 1936; the franchise was closed December 21, 1937; it was signed July 28, 1938, effective as of November 1, 1937?

Q. Now, there has been some testimony introduced here, in fact, a statement has been made by counsel for the Government that under that franchise the Crescent Amusement Company could wait indefinitely to state whether or not it would have a second-run.

A. Of repeat run.

Q. Yes, in Athens, Alabama. Now, at this time, to clear that up, I will read Section 8-e in that franchise.

The Court: All right.

A. (Speaking to the Court) He said Athens; he means Gadsden.

The Court: He said Athens and means Gadsden?

A. Yes.

Mr. Armistead:

Q. Section 8-e is as follows:

The Court: What is the section number?

Mr. Armistead: Section 8-e—little e:

[fol. 1464] "The exhibitor may, at its election, accept for a repeat exhibition any feature photoplays licensed

hereunder at any theater covered by this agreement upon the same terms and conditions applicable to the "Hop-Along, Cassidy" feature photoplays in respect to the feature system in the next schedule A; and the exhibitor agrees to pay his license fees for each feature photoplay during each such repeat exhibition the license fees payable hereunder for the said "Hop-Along, Cassidy" feature photoplays."

Q. Now, what do you mean by a repeat run referred to in this franchise?

A. A repeat run means a run back in the same theater, the picture first played, first run; that is "repeat;" a term used in your business. A complete difference under repeat is a definite run, such as subsequent run, second run, and third run. Repeat means in the same theater.

Mr. Armistead: At this time, your Honor, I would like to call your Honor's attention to the fact there is no provision in this franchise anywhere which says no second run could be sold to Gadsden, Alabama. In other words, the fact that [fol. 1465] an exhibitor has the right to a repeat run doesn't prevent the distributor from selling a second run.

Q. Now, when this contract was made, I mean when this franchise was made, was this picture theater in East Gadsden, Alabama, constructed?

A. Well now, I am not familiar with what happened in East Gadsden, Alabama, because that theater may have been built after I left the position of division manager. I know the situation there. If it was built prior to January 1st of this year, I would know about it, and my memory is clear but I don't remember at that time up to January 1, 1941 that we had made a deal with them; I know that up to that date that there had been some negotiations, but I don't remember if a deal was made.

The Court: Opened September 3, 1939?

A. 1939.

By Mr. Armistead:

Q. I notice in Government's Exhibit 152, in a letter dated November 14, 1938, where you wrote Mr. Unger, where you state this: "In any event, the only way we could sell

second run, even if we wanted to, in this particular town, would be after Sudekum had taken refusal," etc.

[fol. 1466] A. That point is simply this, that Tim Smith simply wanted to buy ten or twelve second-run pictures. It is obvious that if Mr. Sudekum was going to repeat, he would repeat only the big pictures and he would have the right of repeat run, which would destroy the value of those pictures as far as Tim Smith was concerned, and Smith wouldn't buy a whole contract.

Q. Who has the authority to make a franchise for Paramount?

A. Well, only the district manager and the division manager, of course, and the general sales manager.

Q. Well, does a franchise contract have to be approved by the home office?

A. A franchise has to go before the board of directors of the company and be passed on by them. There has to be a resolution issued accepting the franchise.

Q. Mr. Morgan, in these pictures, there has been some proof here about production numbers; do you understand what is meant by production numbers?

A. Well, every picture has to be given a production number in order to identify it in all the routine systems of shipping, book-keeping, and title—it takes too long to bill it out by title; so they use a production number for that purpose.

[fol. 1467] Q. Now, suppose we start out with production No. 800, and we will say the list of pictures would run to 825. Now, does that mean that the production of the picture which has been assigned production No. 800, that the films will be available to the public before, we will say, the picture bearing production No. 809?

A. No, not necessarily. The production number is given to the picture at the time it is originally set for release, but there are frequent changes in release dates, because of delays in production, and so forth, because there are a great many preparatory records used before a picture is released, and it is advisable not to change the production number; so you will find that the pictures are not released in chronological order.

The Court: In numerical order, you mean?

A. In numerical order, pardon me, I mean in numerical order.

[fol. 1468] Mr. Armistead: Just a moment.

Q. Now does Paramount have, and did it have, any understanding with Crescent Amusement Company, or Mr. Sudekum, or any of the individual defendants or exhibitors to suppress competition or any individual theater in any manner?

Mr. Wright: That is objected to Your Honor.

Mr. Armistead: If they had one we would certainly want to bring it out, I want to find out whether they did have one, they called for it.

The Court: You mean a written agreement?

Mr. Armistead: Any kind of agreement, oral or written, Your Honor. Did they have any agreement at all between Paramount and Crescent or any of these exhibitors to suppress any individual theater.

Mr. Wright: If Your Honor please, that is a pure con-[fol. 1469] clusion. We are trying to prove these matters, and I do not see how this witness could know about those things, I do not see how the witness can be of much assistance.

A. Except I wrote the franchises.

Mr. Armistead: They have been introducing letters here that he wrote, they say this is sufficient to make out a case of conspiracy, and I asked him if he did, and I think it is competent to deny what they are trying to prove.

Q. Did the Paramount have understanding or agreement with any of the individual exhibitor defendants or individual defendants to suppress competition of any individual theater, and does it have at the present time, and did it have it during this period of time, mentioned in the complaint?

The Court: That is a question the Court will have to determine from all the facts in the case.

Mr. Armistead: That is true, Your Honor. And Your Honor is going to take into consideration all the evidence in the case, oral as well as documentary, and here is a wit-[fol. 1470] ness here who had charge of this territory down here during that period of time.

The Court: He might say that he didn't have any express understanding or agreement; I might find otherwise.

Mr. Armistead: Yes, sir.

The Court: You can ask him if he ever made any express agreement, or have any understanding.

Mr. Armistead: Or have any knowledge of any such agreement or understanding.

The Court: Yes.

Mr. Armistead:

Q. Did you have any agreement or do you know of any agreement or understanding, or did you have any understanding with these exhibitor defendants, or individual defendants, whereby an individual theater was to be suppressed by *reasl* of any dealings between Paramount and these exhibitors and individual defendants?

A. No, sir.

[fol. 1471] Mr. Wright: Same objection.

The Court: All right, overruled.

Mr. Armistead: Now there is an allegation in the complaint that Crescent and these exhibitor defendants have combined to compel Paramount to do certain things, licensing of feature pictures, and by means of licensing agreements between Paramount and Crescent that these licences have been made.

Q. Has any such thing been done as a result of any coercion or suppression on the part of Paramount and Crescent or any of the other exhibitors?

A. No, sir.

Objected to.

Sustained.

Q. Is Crescent business so important to Paramount that Paramount does whatever Crescent calls on it to do, is that correct?

A. I am waiting for Mr. Wright.

Q. That is all right, do not pay any attention to him.

The Court: Go ahead.

A. Will you give me that?

Mr. Armistead:

Q. Is Crescent business so important to Paramount that [fol. 1472] Paramount would do anything that they suggested?

A. No, the Crescent circuit is a rather small circuit, as circuits go, as to Paramount's service, this is a very small circuit.

The Court: Crescent's circuit as circuits go is a very small circuit?

A. Yes, sir.

Mr. Armistead:

Q. You mentioned some years that Paramount did not make any contract with Crescent; why didn't they make those contracts, was it because they didn't want the deals? Or what was the reason?

A. Well when we came down here, the year I got here, was the year we were out, the first year we were out of the Crescent Circuit, and I endeavored to negotiate with Mr. Sudekum on prices, on the basis of prices, and we never could get together, we never could make it, I couldn't see his prices, he couldn't see mine, he offered some things and then I offered some, but we couldn't get together on that, and the third year I still tried to get together, but he wouldn't buy at our prices, and we turned his deal down, and after that he said that there had been certain promises made to him to turn over the Paramount Theatre in Nashville, Tennessee, if we decided not to operate it ourselves, [fol. 1473] and that theater was turned over to one of our other operators, and Tony didn't feel that he received the consideration he should, but the following year we sold him S-S again 1938-39, I think it was, and again it was a matter of price.

Q. In other words, you all were asking two prices, you wanted so much and he didn't want to give it?

A. By all means. He has a reputation of being a very close buyer, and we were prepared for it, and I guess he is.

Q. When you made this deal with Crescent to run these pictures here at Brownsville, was that taken into consideration there, that it was a circuit deal, or did you take Brownsville just by itself?

A. A. Well we took Brownsville by itself, because that same year we sold other towns that Tony was in, I can't recall whether Maryville or Greenville was in the Crescent Circuit, but we continued to sell the independents where we started, it was to our best interest to do so. We didn't consider it in Brownsville.

Q. Then did you receive communications from Mr. Lawing?

A. Yes, sir, we did.

Mr. Wright: I think we have records to show exactly [fol. 1474] what happened by various exhibitors.

Mr. Armistead: [redacted] the Government has them now I call for them, so they can be exhibited at once.

The Court: All right.

Mr. Armistead: While Mr. Simons is gone to get them, to get those records;

Q. What kind of a customer has the Crescent Amusement Company turned out to be, and has it been all along, did it play the pictures and carry out its contracts?

A. Paramount's records show for the period I have been in the South, which is constantly quite a few years, without a question of a doubt that Crescent Circuit has been the best customer that Paramount has had, and that goes to my whole division, of which I have intimate knowledge.

The Court: What do you mean by division, when you say Crescent is the best customer?

A. I mean that if a deal was made with the Crescent Amusement Company, it played the deal to the letter.

The Court: The only trouble is to get him to sign up at first?

A. Yes, sir.

[fol. 1475] Mr. Armistead:

Q. And those factors, that he played the deal to the letter, and that there was no trouble except to sign him up at the beginning, as he took the product, and paid for it, all those factors are factors that entered into the situation in influencing Paramount to make a deal with a theater?

A. That factor was one of the factors or things, that brought about the contracts and to accept the franchises, caused the board of directors to accept the franchise.

Mr. Wright: If the Court please, I do not think he is competent to say what influenced the board of directors, he can state his recommendation.

A. It was my recommendation, let me put it that way.

Mr. Armistead: That will be all, Your Honor, until I can find these play-offs.

Mr. Wright: If the Court please, Paramount has not produced the play-off of the time, 1934-35 season, as all we have is the Crescent for that season.

Mr. Armistead: They are not here.

Mr. Wright: No.

[fol. 1476] Mr. Armistead: Well that is all right then, get them down here so the witness can examine them.

Redirect examination.

By Mr. Wright:

Q. Now, Mr. Morgan, when did you first come to Nashville this time?

A. This time, I came here last Saturday, and I left on Sunday afternoon, I think, and when came back.

Q. When did you come back?

A. I came back Friday night of this past week.

Q. Have you been here since then?

A. Yes, sir.

Q. Have you had any discussion of your testimony with counsel for the defendants?

A. Yes, sir.

Q. And you have discussed all of these letters that were offered here with them?

A. No, I wouldn't say I discussed them all, I discussed them all with our own counsel, but I do not believe I discussed them all with defense counsel. Some might have been.

Q. Who are you referring to as your own counsel?

A. I am referring to Mr. Irvin Cohen.

Q. He came down with you from Paramount?

A. Yes, sir.

[fol. 1477] Q. You also discussed these letters with Mr. Austin Keough at the time they were first produced?

A. No sir.

Q. Anybody else of the Paramount?

A. No sir, except my son.

Q. Or any others? Your son is also in the Paramount Legal Department?

A. Yes sir.

Mr. Wright: I would like to have that letter in which Mr. Morgan referred to an inability to sell Mr. Smith second run because of the franchise——

The Court: What is the Exhibit Number?

Mr. Armistead: That is Exhibit No. 152.

Q. Now is this case of Exhibit No. 152, you say

> "In any event, the only way we could sell second run, even if they wanted to, in those particular towns, would be after Mr. Sudekum had taken the refusal, because Paragraph 2 of Article 8 of the Crescent Amusement Company franchise, provides that he can repeat any picture at a certain given price."

A. That is right.

Q. That statement was correct at the time you wrote it, was it not?

[fol. 1478] A. It was, yes sir.

The Court: Is that the clause in that franchise that was later modified?

A. Yes.

Mr. Wright: Yes sir, that was later modified in 1939, to provide they had to exercise the option within thirty days after they completed the first run. This provided they could apparently exercise it at any time.

Mr. Armistead: At that time—Excuse me for interrupting, but that amendment in 1939 was for the purpose of clarifying clause 8-E.

Mr. Wright: As to what its purpose was, you may offer testimony, but it says in the contract he is to exercise the option within thirty days after the first run.

Q. Now, the same situation that you described in the contract I have just referred to would provide, under that clause, for any town covered by the franchise and where Mr. Sudekum operated, isn't that a fact?

A. That is a fact, yes, up to the point of the clarification of that rider.

Q. Now, you negotiated that second run option, so-called in Paragraph A, Article 8, with Mr. Sudekum?

[fol. 1479] A. It was not a second run option. It is a repeat option.

Q. Whatever it was, you were the one who negotiated that with Mr. Sudekum?

A. Yes sir, that is correct, with Mr. Stengel and Mr. Sudekum.

Q. At the same time?

A. At the same time the deals were made.

Q. The option apears in the same clause in Mr. Stengel's contract, the clause bears the same number?

A. I think it does.

Mr. Wright: By the way, I would like to offer that in evidence.

A. (Continuing:) I think it does, I am not positive, I am not sure that it does. I don't think it does have the same clause number, Mr. Wright.

Mr. Wright: I want to offer in evidence the franchise made for the Rockwood Amusement Company, and its subsidiaries, dated the same date as the franchise with Paramount, and have that marked with the next P-number, and also the contract made on the same date with the City of Nashville.

A. I don't think that is the City, I think that is first run Nashville, Mr. Wright.

Mr. Wright:

Q. Covering the first run, Nashville?

A. Yes sir.

[fol. 1480] Mr. Wright: And the modification letter, dated May 25, 1939, from Stengel to Paramount and agreed to by Paramount, by Mr. Morgan, modifying the Rockwood franchise, which is a previous Exhibit P-29.

Q. The next franchise you have there is first run, Nashville?

A. Yes.

Mr. Wright: I ask that that be made Government Exhibit P-30, and modification of P-30 would be P-31.

Q. When was it you first dissussed this paragraph E. of Article 7 with Mr. Sutlekum and Mr. Stengel?

A. Oh, that would be hard to remember. We negotiated that franchise over a period of many months and all these various things were brought up and discussed at the time. I can tell you, we started discussing the details of the franchise in October, 1936 and then on the question of picking out each clause——

Q. Do you remember when you started talking about this particular clause?

A. No, I couldn't remember. You mean, with the Crescent people?

Q. Yes.

A. No, I couldn't remember the exact date.

Q. Approximately?

[fol. 1481] A. No. We negotiated over a period, I think, of over a year or more.

Q. That was a clause which you also had some discussion about with your Legal Department, wasn't it?

A. No, not until the Tim Smith matter came up and I wrote Mr. Unger and Mr. Unger wrote back and he said he thought that was a bad clause as it was written and that there should be a limitation place on the time of selection, and I agreed with him and we intended that that clause, it was intended to have a limitation on it, but it was drawn up with no limitation, because there is a limitation in the franchise on the period in which they must pay for the pictures and a period within which they must make a selection——

Q. Let's see if we can get an answer that is responsive to the question. You can bring in all these other things later.

A. I just wanted to make it clear.

Q. You can't fix the time, can you, even for the year within which this question of the repeat run provision in the franchise first came up?

A. Yes, I will fix the year for you. It was some time between October 1936, and December 1st, 1937.

Q. Do you remember who suggested that the franchise have in there that that provision be in the franchise?

A. Well, I don't think the seller would suggest that those things be in the franchise.

[fol. 1482] Q. That was a provision that——

A. The buyer would like to have it.

Q. That was a provision that was calculated for the benefit of the Exhibitor?

A. Necessarily, if the terms are right.

Q. Now, apart from the other terms, the plain purpose of the provision is to give the exhibitor additional protection, is it not?

A. No, no, you are writing something into the franchise that is not there, Mr. Wright. It might be also the fact that the exhibitor might think that, having the opportunity to repeat better pictures, that he might eliminate the poorer ones and be able to hold up his business better.

Q. I am not asking you what might be?

A. I am answering your question. I am telling you what is——

Q. I want to know what it is, when this was written?

A. That was the purpose of the clause.

Q. What was said about the clause at the time it was negotiated, can you tell us?

A. Yes, I can tell you, in general, what was said.

Q. Let's have it?

A. They stated this, that there were some pictures, they would like to play all the pictures and not eliminate any, not even in the cancellation clause that was in all the [fol. 1483] contracts at that time. But they would like to have the privilege, if it was agreeable to us, whereby they could repeat some of those pictures and still take the cancellation of the poorer ones and both of us would possibly be in a more profitable position, and that I agreed to.

Q. Was there anything said at that time about a possibility of your selling other exhibitors who might be in those towns, or who might appear in those towns, an additional run of Paramount pictures?

A. No, there was nothing said; as a matter of fact, no exhibitor ever asked us for a second run until Tim Smith asked for it. That was when that provision was first discussed, that it had no limitation.

Q. Did you ever hear of the fair trade practice, as it is called, that a distributor worked?

Mr. Raftery: Your Department worked on——

A. I have heard of it.

Mr. Wright:

Q. You had heard of it at the time you were negotiating this clause, had you not.

A. Yes, I had heard of it. I would like to know——

Mr. Armistead: There was no question asked about that on direct examination.

Mr. Wright: There was no question asked about the purpose of this clause.

[fol. 1484] The Court: Go ahead.

Mr. Wright: I want to show the background of those negotiations.

Mr. Armistead: You make him your witness.

The Court: He didn't question him very extensively about 8-E, Mr. Armistead is the one who brought that out.

Mr. Wright: What?

The Court: Mr. Wright didn't question him very extensively about 8-E, Mr. Armistead is the one who brought out the execution of that. Go ahead.

Mr. Wright:

Q. You may answer the question.

(Question read by the Reporter.)

Mr. Wright:

Q. At the time you were carrying on these negotiations, you were also familiar with the fact that the Government had instituted its suit against your Company and other distributors in New York, in July, 1938? That is correct, isn't it?

A. I can't remember that. I suppose if I sat down and checked the date, I could remember. I don't remember. I don't think I was thinking about that at all when I was negotiating, I don't think so.

[fol. 1485] Q. Back about the time the suit was filed, you heard about it?

A. I can't say, unless I knew the dates. How can I say?

Mr. Waller: The suit was filed in July, 1938.

A. That is after the franchise was negotiated.

Mr. Wright:

Q. Had you had any notice that a suit might be filed by the Government at this time this was negotiated?

Mr. Armistead: Nobody can tell when the United States is going to institute a case; how could anyone guess at that?

The Court: Unless you can show he had notice, I don't see.

Mr. Raftery: Mr. Arnold didn't get to Washington until the end of March, 1938.

Mr. Wright:

Q. It is a fact, isn't it, Mr. Morgan, that at the time you were negotiating this franchise, you were aware of the many complaints that had come to your Company and the other distributors, to the Department of Justice, about exhibitors not being able to buy some run of your pictures?

A. No, Mr. Wright, no. We——

Q. You have heard of such complaints?

A. Maybe I had, a couple, myself, but I couldn't be aware of the others, no sir.

[fol. 1486] Q. Well, you had heard of those complaints?

A. I have heard them all my life, since I have been in the film business.

Q. That has been one of the stock complaints?

A. No, it has not been one of the stock complaints, I just heard of them once in a while.

Q. You had heard of it at the time you were carrying on these negotiations?

A. Heard of what? You speak about general complaints, all of the United States? I say no, I couldn't have heard of them.

Q. At the time you carried on these negotiations, had you ever heard of any exhibitor complaining that he couldn't get a run of Paramount pictures in a certain situation?

A. What situation.

Mr. Armistead: Just a minute. I submit that question will not throw any light on any of the issues in this case. Any exhibitor; it might be some fellow way up in Kalamazoo, Michigan complaining about something that is not in this lawsuit at all.

[fol. 1487] The Court: All right. I don't see where it is material. What is the object or purpose of it?

Mr. Wright: Well, if the Court please, this provision was, on its face, expressly designed to prevent anybody from getting the relief that was contemplated, either in the— or by decree that would make it possible for an exhibitor to get a run of pictures where there was strong circuit opposition. That is the effect of it, possibly.

Mr. Raftery: That is a very unfair statement, may it please the Court, of the clause, and I heard the clause read here this morning. That clause doesn't prevent any exhibitor from getting any run. It is a clause that gives the right to a repeat run. He could play second or fourth or fifth or tenth run before the repeat run was had in any particular theatre. It is a very common practice to repeat big pictures in theatres and that is all that is taken care of in that paragraph and it doesn't say you can't sell a second run, or third run or tenth run.

The Court: No. The question was whether he had heard some exhibitors complain that they couldn't get films.

A. No, I can't answer that. I can't answer that question [fol. 1488] without making a fool out of myself. And I don't care to do that right now.

The Court: Well, I wouldn't answer it then.

A. Thank you, Judge.

By Mr. Wright:

Q. Do you recall whether, at the time you carried on those negotiations anything was said about what the effect of this clause might be upon competitors of the Creseent and Rockwood circuits who might seek to buy or run your pictures in the towns where those circuits operated?

A. No, Mr. Wright. Nothing was discussed about that at all. There was no such intention. It wasn't the purpose of it at all.

Mr. Wright: I move to strike that as unresponsive. Just confine yourself to answering the questions, Mr. Morgan, and we will get along fine.

Mr. Armistead: He has answered that question.

A. I just repeated what I said.

The Court: Well, he said he never discussed—the question was whether anything was discussed as to the effect of the clause, and he said, no, there was nothing discussed [fol. 1489] about it and then added, that was not the purpose of it.

By Mr. Wright:

Q. When you were framing this franchise did you give consideration at all to what effect that franchise might have upon exhibitors who were competing with the Sudekum circuit?

A. Yes sir, I gave full consideration to those things.

Q. Did you discuss that with Mr. Sudekum and Mr. Stengel?

A. Well, in what respect?

Q. In any respect. Did you discuss what the effect of the franchise would be upon independent exhibitors competing with them in the situations where they operated theatres?

A. We wouldn't have accepted the franchise——

Q. Now, just answer the question. I asked you what you discussed——

By the Court: Just answer and then make your explanation.

A. All right, Sir. Ask the question again, will you, Mr. Wright?

(Question read by reporter.)

A. No, there was no such discussion.

Q. Did you discuss it with anybody?

A. No. Certainly I discussed it with nobody. I want to explain this. Judge, let me add to that.

The Court: Go ahead.

[fol. 1490] A. We certainly wouldn't have accepted a franchise with no discussion with a distributor in which we felt and knew that there was something in his franchise that would give Sudekum the right to freeze out the small exhibitor. I want to make that very clear.

Mr. Wright: I move to strike that. That is entirely unresponsive.

Objection overruled.

Q. Well, as you explained it in your letter, with respect to Tim Smith, the effect of this provision was to prevent you from selling — the independent exhibitor a run of your pictures unless Mr. Sudekum previously waived his right under the franchise, is that correct?

A. That is hardly correct, Mr. Wright. They sold a run, I believe, to this theatre in Gadsden. I can't call the name of it. They had that run at Gadsden.

The Court: He is asking about Tim Smith.

A. In the case of Tim Smith, Judge, that letter will have to be explained and I did explain it to the effect that Tim

Smith had asked for only ten or twelve pictures, second run, and I said that we would not and it was not our policy to sell any exhibitor a short field of ten or twelve pictures out of fifty to sixty five pictures, according to the number released that year, and, I therefore, stated it would [f. l. 1491] be impossible for us to sell Mr. Smith without giving Mr. Sudekum, our regular account, an opportunity to repeat those bigger pictures in the same theatre. That is what the letter means.

By Mr. Wright:

Q. What difference would it make if he had offered to buy all the pictures?

A. That is a different thing. He did not.

Q. What difference would it have made under the franchise?

A. If he was a good exhibitor we might have sold him second run. I doubt if we would have sold Tim Smith.

Q. You couldn't sell him second run on any of those pictures that were covered by the franchise until you found out whether Mr. Sudekum wanted to repeat them at his theatres?

A. We could still sell a second run under that clause of that contract, Mr. Wright.

Q. Well, the clause in the contract, as I understand it, provides that Crescent may repeat any picture covered thereby at any of its theatres, in the same theatre,—at a certain rental?

A. That is right, Mr. Wright.

By the Court:

Q. Does that mean now—suppose Crescent would show a picture on one occasion and they have a competing theatre there in that town that had a contract with you for second run pictures. After Crescent had shown that particular [fol. 1492] picture one time in its theatre would anything in that clause prevent the independent theatre from proceeding to show that same picture on the second run before Sudekum showed it on the repeat?

A. No sir, there is nothing in that clause that would prevent that.

Mr. Wright: If your please, the clause says that Mr. Sudekum has the right to repeat any of the pictures covered at any of his theatres. That is what it says, on its face.

A. That is correct, Mr. Wright, but it doesn't say you can't sell second run or third run or fourth run.

By the Court:

Q. Well, do you have any instances to arise where that was done under the contract?

A. No, Judge, that is what I explained—it never came up to Paramount. Nobody ever asked Paramount for a second run until Tim Smith asked for Gadsden and then I wrote the letter.

Q. Not in Gadsden.

A. In those towns, Newport, Harriman and Morristown and I wrote to New York and Mr. Unger said that was a bad clause the way it was written and a limit should be put on it.

Q. That is the reason you changed it and put in the thirty day limit?

[fol. 1493] A. Yes sir.

Mr. Wright:

Q. Without the limit—let's get this straight. You couldn't sell a second run until you knew whether they were going to exercise the option, is that right?

A. Mr. Wright, I will let the clause speak for itself, exactly the way it is worded in the franchise.

The Court: If it was amended and a limitation put in, unless you had some particular evidence as to why that limit was put in there, I think we should consider the franchise with the limit of thirty days on 8-(e) as being the contract, because the witness has said that they had no instance to come up under the contract.

A. That is correct.

The Court: Or where any independent exhibitor wanted a second run except Tim Smith.

Mr. Wright: Well, it doesn't matter how many there were. The situation came up and this is the way the contract was interpreted.

The Court: And I wasn't so forcibly impressed with Tim Smith.

[fol. 1494] Mr. Wright:

Q. Let's find out why the modification was made. When did you discuss modifying this clause?

A. I just explained that. As a matter of fact, I can say very honestly there was never any intention to leave that clause without a limit in the length of time because after all I think no one could make contracts and let him have the right of selection for forty years.

Q. In other words, your testimony is this, that the way the clause was written was an oversight?

A. Now, the fact that there was no limit on it——

The Court: What I had in mind—You gentlemen didn't follow me. What I had in mind, if the distributor, after making a franchise of that kind, saw that it might operate to the prejudice of the independents or to themselves on the occasion that came up, such as in the instance of Tim Smith, and then voluntarily change it, I say they should have credit for that.

Mr. Wright: I think they are entitled to credit for changing it. The fact remains that as they originally made it and even as they changed it, it continued to prevent any second run competition.

[fol. 1495] The Court: The fact that they changed it voluntarily later on would indicate to the Court that it wasn't put in there, in the first place, for the purpose of elimination of independent theatres.

Mr. Wright: I think that is a matter to be inferred from all the facts in the case.

The Court: All right. Let's adjourn Court until 1:30.

(Recess for lunch)

[fol. 1496] The Court: Mr. Wright, is it the theory of the Government that this clause 8-e in the franchise was not modified until after the complaint had been made to the Department of Justice and other distributors had been complaining?

Mr. Wright: That is right, your Honor. We think it still has not been cured as it was written on its face; it doesn't eliminate second run competition in the towns where they operated.

The Court: Well, from that standpoint, accepting that as true, it would be an elimination for a period of thirty days?

Mr. Wright: Yes, but you see the point is this, your Honor: They have within 30 days after the showing of the picture first run after the showing of each picture in which to decide whether they want to play or not; then they have the next 120 days in which to play. Now, it is obviously impossible to sell somebody else a second run under those conditions, because you never know whether Mr. [fol. 1497] Sudekum is going to exercise his option to play in one of his houses until after the expiration of the 30 days.

Q. As I understand it, Mr. Sudekum has to decide before the expiration of thirty days before he plays the picture whether or not he will ask for a repeat performance?

A. Yes.

Q. And of course, if he doesn't ask for a repeat performance, they could let any one else have the picture for a second run within 30 days after he shows the first run; if he does ask for thirty days, it would be 120 days additional?

A. Yes, he has 120 days in which to date it.

Mr. Raftery: The life of the run has nothing to do with the second run. This type of clause, I mean the play and repeat form, is an exception rather than the rule. If an outstanding picture comes along, for instance, "On the Road to Zanzibar" an exhibitor, as Mr. Morgan describes it, might say, I would like to play a repeat run on that picture in the same theater, rather than play one of the weak sisters; and he eliminates the weak sister in his commit- [fol. 1498] ment; he may have a commitment to play 40 out of 52 pictures; by playing the repeat he gets an elimination then of 11 instead of ten.

The Court: Your theory is, then, that if there is a second run contract that, subject to whatever clearance provisions might be made in the second run contract, that otherwise second run could be made at any time?

Mr. Raftery: That is right.

The Court: Within thirty days.

Mr. Raftery: At any time; take the Gadsden situation, where the man plays within 60 days after the first run. Sudekum might play and only have top pictures in the

Princess Theater. On the 60th day after first run that picture would be available in East Gadsden and would play; under the repeat clause, Mr. Sudekum might say, I want to repeat "On the Road to Zanzibar", he figured he could get a good crowd, get a good repeat.

[fol. 1499] The Court: Suppose he wanted to repeat within sixty days before the sixty days clearance was up.

Mr. Raftery: And then Gadsden would get the same availability.

The Court: And what run would that be?

Mr. Raftery: It would be a third run. It is the uncommon situation.

The Court (To Witness:) All right. Have a seat in the box.

Oscar A. Morgan, Recalled for further examination, testified further as follows:

By Mr. Wright, For the Plaintiff:

Q. Now, Mr. Morgan, did you have any discussion with Mr. Stengel or Mr. Sudekum, with respect to modifying that section or clause 8-e of the franchise?

A. Yes, sir, I did.

Q. You had a large volume of correspondence with both of them about that, did you not?

A. No, I don't think there was any correspondence about [fol. 1500] it. I think it was all conversation. I think I came up to Nashville and told them we would have to modify that clause, that we couldn't leave a clause in that gave them an indefinite privilege.

Q. Did they say anything about a greater—the length of time within which they were to exercise that option?

A. Well, there is no question but what there was some discussion as to when it would be, but we still stuck to our original thought in the matter; the way it is written was the way it was originally put to them; they wanted a longer time and we wouldn't give it to them.

Q. Was there anything said with respect to the effect of the modifying clause would be as to the exhibitor?

A. No, sir, at the time the clause was written the Crescent Amusement Company was playing no regular second runs in any of the other towns, and there were no second runs in those towns.

Q. A very large number of the towns were large enough to support a second run, are they not?

A. Well, I think that is mostly up to an exhibitor to decide; you can't go by population.

A. As far as you were concerned, I take it you had no objection to selling second runs in the towns, or you wouldn't have made this clause?

[fol. 1501] A. That is correct; we would have sold a second run at any time.

Q. Now, these Crescent and Rockwood franchises are both dated March 23, 1939; is that about the date the modification was made?

A. I think that is the date, yes, sir.

Q. I show you a letter here, dated June 22, 1939, from Mr. Sudekum to you and ask you to read that letter and see if it refreshes your recollection on this point?

A. Yes, it does; we didn't agree with this; they tried to argue with us that we might not be able to supply the prints to them within the period of time, and there is a letter somewhere stating that we wouldn't worry about that, that we would guarantee to supply the prints during that period.

Q. I call your attention to the letter of June 22, 1939.

A. Well, I didn't notice the date on there. I can't swear as to the date of that amendment, because I haven't looked at the date.

Q. It is possible that the amendments that are dated May 25, 1939, might have been agreed upon at a later date and then dated back?

A. No, no, nothing like that. I think it is possible that Stengel might have called this to Sudekum's attention, that the clause was written and wanted to re-modify it, which [fol. 1502] we refused to consider. I know at the time he said, what if we cannot supply the prints, we said we would guarantee to supply them within the time.

The Court: Were those modifications of that clause made in 1939?

Mr. Wright: Yes; so on that date there were a whole series of modifications; those are both dated May 25, 1939.

Q. Now, Mr. Morgan, Mr. Sudekum is referring here to a 90 day period—

A. In which they date to play the pictures after they have made the selections.

Q. I don't see any reference to any 90 day period in this modification; it is dated May 25th, 1939.

A. May I see that modification; it may be a different one from what I know anything about?

The Court: That was what was confusing me.

A. (After examining paper) Well, I can't explain that. This says 120 days in which they have to play the pictures. I was under the impression, Mr. Wright, that the Crescent modification—I haven't looked at that modification—was 90 and the Rockwood was 120; that is the impression that I [fol. 1503] was under.

Q. It is quite possible, isn't it, that sometime subsequent to this letter of June 22, 1939 with that reference to a 90 day modification, that they made an agreement and that was modified in an agreement and dated back to May 3, 1939.

A. There is no attempt on my part to explain that, because all I have to stand on is a modification and the date is was signed.

Q. Do you know whether or not it was actually signed on the date it bears?

A. As far as I know, yes, sir, from the correspondence.

Q. Well, this correspondence would indicate that it was signed at a subsequent, later date?

A. If you are wishing to imply that——

The Court: He is not only wishing to imply, but he is.

A. May be I should say that that letter was dated April 22nd, or May 22nd, I don't know how it is dated; it speaks for itself.

Mr. Wright:

Q. And it might have been signed at a subsequent, later date, is that right?

A. Well, I don't get what you mean by that; if you mean that the legal department would leave the original date in [fol. 1504] there, as to when it was signed, you will have to have the legal department in, sir. I can't——

[fol. 1505] Q. This letter of June 22, 1939, from Mr. Sudekum to you, suggests to your mind that they were still

negotiating trying to get together? That there were negotiations going on?

A. That there were still negotiations going on.

Q. You wrote and sent this modification, on that date, it shows that does it not?

A. I am not going to attempt even to explain that rider, the rider speaks for itself, that is all I can say regardless of the correspondence. I do not have any independent recollection.

Q. You do not have any independent recollection when you actually did make the modification agreement, the modified agreement, which is dated May 25, 1939?

A. No, sir, I have no independent recollection on that.

Q. When was it you said you started this investigation of Mr. Roth's complaint?

A. Just as soon as we got the letter from Mr. Roth.

Q. It was after you got that letter you started the investigation and decided that Mr. Roth was not an acceptable account?

A. No, it was my recommendation that we sell the product to Crescent, and not to Roth.

Q. When was it you wrote that, do you recall?

A. Well it was sometime before that, it was some time in [fol. 1506] the period that Mr. Roth was playing the pictures, and prior to the time he made any complaint at all, I can't remember the exact date, but I think the correspondence will show it. We have correspondence that will show that.

Q. Can you produce that for us?

A. I think we can.

Q. I call your attention to a letter dated February 11, 1937, from Mr. Unger to you, in which he says:

> "You state that Mr. Roth has been a good account, and I feel under the circumstances that we should protect Mr. Roth with our pictures for next year."

A. This is when we made the S-9 agreement with Mr. Roth.

Q. That was in the summer of 1937 that you made that deal?

A. I will have to check the date on that, that was in answer to one of the letters I think you showed me this morning that I wrote Mr. Unger that, that said to sell the S-9 product to Mr. Roth.

Q. And at that time you regarded Mr. Roth as a satisfactory account, is that right?

A. In that particular town, because we didn't know as I explained this morning, I had no definite ideas if and when Crescent was going to open that theater in Gallatin.

Q. And your complaint to Mr. Roth, or about Mr. Roth not playing off the 1937-38 pictures, and about that, did [fol. 1507] not arise until after he had complained to you about selling the next season's product to Mr. Sudekum, isn't that correct?

A. It just depends that—it just happens that he made two complaints in the same letter; he complained about selling away, if you recall that letter you introduced this morning; you will see in the same letter he said that our pictures had not been good, that our pictures had been very bad, and he wanted an adjustment.

Q. And that came up about that, and that was the first time there was anything to indicate to you that that kind of an account was not a desirable account?

A. You may have a different understanding of a desirable account, I never said he was a desirable account, not even this morning; I was asked the question if he had played his contract, and I said no, he had not.

Q. Now, Mr. Morgan, you referred this morning to a policy of your company to offer a split deal on pictures for any season wherever you found yourself in the embarrassing position of having two old customers who are both ready to buy.

Mr. Armistead: I submit that the witness did not testify that he found himself in any embarrassing position, that is not in the record.

The Court: Well state it now.

[fol. 1508] A. I don't think, Mr. Wright, I testified it was a policy, I think that I testified to the fact that it was not unusual for the company to split the product in many cases in the United States.

Mr. Wright: I understood you to say that there had been a policy that you had developed in the course of the years?

A. I don't think I said it was a policy of the company, I think I said it was not unusual to do that in many cases.

Q. Is it usual or was it usual to go back and offer a split after you had sold the entire product?

A. No.

Q. That was not usual?

A. No, indeed.

Q. Now, Mr. Morgan, you testified this morning at length about all the factors that went into the determination as to whether or not you would sell or continue selling the particular account; did you name all the factors you considered there?

A. I didn't even number all the factors that Mr. Armistead named, I do not even remember them, but I said those factors and probably many others that would leave it to the judgment of the man in the field as to whether or not he should leave his product there or sell it to another account.

Q. Now the size and character of the theaters involved [fol. 1509] was only one of the great many factors that you considered, isn't it?

A. Yes, that is correct.

Q. And in many situations an inferior theater may yield Paramount a much higher rental for its pictures than a good theater.

A. Yes, possibly that is right, that is possible, may be not as inferior as that situation, but that is possible.

Q. Did you take the trouble to determine how the rentals you got out of Crescent at Gallatin for the 1938-9 season compared with the results you previously had, compared with the rentals you previously got from Mr. Roth?

. . . . . .

A. He had asked for an adjustment himself.

Q. He paid you substantially more for the feature films that he exhibited through the 1937-38 season, than the Paramount paid you for 1938-39 season?

[fol. 1510] A. You mean Crescent?

Q. Yes?

A. I do not think it was substantially more, I would like to see the record, but I do not think it is substantially more.

Mr. Wright: The Paramount also does not have the play-off records of Gallatin here.

A. I recall this, Mr. Wright, it is pretty close to the same figure, I don't think it was substantially more, but you have all these exhibitors like that, he could not have continued on that contract; obviously, the testimony that is introduced would show that.

Mr. Wright: That is a matter of argument, and I object to it.

A. It is a matter of evidence.

The Court: Yes.

Mr. Wright:

Q. State whether he could or could not continue?

A. He could not have continued to pay the film rentals he had previously paid, Judge, based on the receipts where he was paying thirty-five dollars, and Crescent forty-five.

Mr. Wright: I move to strike out this testimony.

[fol. 1511] The Court: All right.

Mr. Wright:

Q. Mr. Roth did not ask you for any reductions on the film rental until after he had requested you and talked to you about having sold the 1938-39 product away to Crescent?

A. I do not recall those dates, it was either at that time or very shortly after that, he wrote Mr. Unger. He didn't write me.

Q. I believe you testified this morning, Mr. Morgan, that the deal you made with Crescent for Brownsville on August 22, 1935, was not a circuit deal?

A. No, that was a circuit deal.

Q. It was a circuit deal, wasn't it?

A. Yes, sir.

[fol. 1512] Q. And the same date you sold the rest of the Crescent Circuit under that contract to them?

A. That is correct, yes sir.

Q. I believe you also referred to some buying power of Mr. Lawing which had enabled him to get from you, for the preceding season, a selection of both the 1933-4 and 1934-5 pictures. Now just what were you referring to there?

A. Maybe the use of the word "buying power" isn't quite the right word. The point is there, that in selling these small accounts that have no opposition in their town, and he had no opposition when we made that deal with him; we couldn't sell him the year before, if you follows me.

Q. And when any exhibitor is left off, you say he demanded it?

A. I don't get that. But he got a selection of 52 pictures out of 104; in other words, his S-6 contract had a clause written into it that he could buy any of the pictures released the previous year and cancel one of the pictures released that year.

Q. You would have been perfectly willing to sell him all of the unplayed product?

A. I didn't get clear this account and the 104 pictures. He negotiated with the salesman and got him to make that kind of a deal.

Q. You were not able to get your product played in any- [fol. 1513] where in the Crescent Circuit for any of those years?

A. That is correct, but I wanted to make the point about buying power. What I meant was, to get into one of those small towns that had no opposition, that occasionally, in a very unusual case, you would allow an exhibitor to make a selection of 52 pictures using two years product. Because if that was the policy, it normally follows that exhibitors would leave you out every other year and get that kind of a deal. That is the point I wanted to get over this morning. I know there are reasons to make the deals, but it is a very unusual case to make that kind of a deal and I assure you it is not a practice in this business.

Q. Now, I think that you said something about Mr. Lawing not being your old customer in Brownsville, at the time you took the product away from him?

A. Oldest?

Q. You didn't regard him as your old customer?

A. No, I said I didn't regard him as a good customer.

Q. He was at that time a far superior customer to the Crescent Amusement Company, was he not?

A. In that particular town, yes.

Q. Well, in any town?

A. I don't think that you get what I mean. Whenever we had done business with the Crescent Amusement Com- [fol. 1514] pany, whenever we had signed a deal with them, they played the contract out as it was written.

Q. Yes, but you hadn't been able to make any deal to get any pictures played in the Crescent towns for the past three seasons?

A. That is true.

Q. At the time you sold Mr. Lawing? Isn't that correct?

A. Yes, because we would not take their deal.

Q. Mr. Lawing had bought three seasons product in Brownsville, hadn't he?

A. Yes, but you don't still get the point. We wouldn't take the Crescent deal, but Mr. Lawing wouldn't do any business with us at all, he wouldn't even talk to us.

Q. Now, just a minute. Did you offer any of your 1935-6 pictures to Mr. Lawing before you made the circuit deal with Paramount—With Crescent, I mean, on August 22, 1935?

A. I don't know, but I don't think so.

Q. Well, you don't know that your did not?

A. No, I don't know that the salesman didn't, but I don't think so.

Q. Now, you testified at length this morning as to what these salesman's recommendations were. The records show; can you produce for us these records that you have testified to on this Lawing situation?

A. I think we can if you talk to our attorneys here. [fol. 1515] They have got them, I believe. I understood that you had had access to all of those same records and still have.

Q. Your understanding was not correct.

A. I think it is.

Mr. Armistead: Just a minute.

Mr. Wright: You can produce them for us and turn them over here today?

A. What about it?

Mr. Cohen: That is right, you had access to all of these records.

Mr. Wright: We haven't the 1932-1933, 1933-1934, or the 1934-1935.

Mr. Cohen: I don't know what you have looked at; you were shown everything we have here.

Mr. Wright: Are you willing to have them here today for us to examine?

Mr. Armistead: We are not willing to. It is every day and every night they have called on us for something. We have to try this lawsuit.

Mr. Dobey: I think the record will show the defendant Exhibitors have not turned over anything to us.

Mr. Armistead: The record will show for itself.

The Court: Do you wish to see the records? If so, you [fol. 1516] will have an opportunity to get them.

Mr. Wright: We would like for the Court to see them and perhaps with the right of cross-examining this witness on such testimony as he bases on these records.

The Court: Just what records do you want, what records are they?

Mr. Wright: The records that he referred to in his examination this morning, recommendations regarding cancellation of pictures which related to the purchase of Paramount pictures by Mr. Lawing, for the seasons, 1932-1933, through 1934-1935, inclusive.

Mr. Armistead: I understood he objected to the introduction of those this morning.

Mr. Wright: I didn't object to the introduction of the record, I objected to him testifying without the records.

Mr. Armistead: We had correspondence here and you objected to that, as I recall.

The Court: Do you have those records here?

A. I think our attorneys have got them, I don't know whether they are here or not. I would rather lean to the decision of our own Counsel, Paramount's Counsel.

[fol. 1517] Mr. Cohen: If he will tell us exactly what he wants I will try to get them.

Mr. Wright: I said the records here.

Q. Can you tell him so that he can understand the records that you referred to this morning when you were testifying about Mr. Lawing?

A. I am referring to what is generally known as a recapitulation sheet, which I understood you had access to.

Q. Is there anything else that you were referring to?

A. No, that is all, that is all I did.

Mr. Cohen: I think we can furnish that.

Mr. Wright:

Q. Mr. Morgan, you referred this morning to the factors you had in mind when you sent this telegram, dated August 22, 1935, that was introduced in evidence this morning. Now, when was it that you decided or were able to recall just what you did have in mind when you sent this wire?

A. How do you mean? I wish you would enlarge on that a little.

Q. You hadn't seen this wire for at least six years prior to the time you came down here, had you?

A. That is right, yes, that is right.

Q. Then you discussed it here with your Counsel, from Paramount?

A. No sir, I did not, I never saw that wire for six years until you showed it to me this morning.

[fol. 1518] Q. You didn't discuss this particular piece of evidence here with anyone, is that right?

A. No, that is correct.

Q. With the Paramount Counsel?

A. Now sir, I never recalled that wire until you showed it to me this morning.

Q. The first time you had any recollection that that happened or the factors or reasons you might have had in mind at the time you sent the wire, was when you were asked by me this morning?

A. That is right.

Q. This morning, as to what you had in mine?

A. That is right, when you showed me the wire.

Q. Now, it is possible, isn't it, that what you might have had in mind, also, is the number of theatres that were involved in that possible deal that was in sight for the Crescent Circuit, isn't that correct?

A. No, I don't think that is possible. The very fact is that we made the deal with Crescent Amusement Company, as far as those towns were included, it included those towns, I knew he had a deal in those towns, one of them anyway.

Q. You realized the Crescent Theatre you had in mind, as compared with what you might realize from Mr. Lawing in Brownsville, was one of the factors that was in your mind at that time that you sent this wire?

[fol. 1519] Yes that factor is always in a persons's mind; not to the detriment of the Company, but they can't eliminate the fact.

Q. Just answer the question?

A. I will answer it.

Q. If you had that factor in mind this morning?

A. (No reply)

Mr. Morgan, I believe you testified this morning that you had Mr. Rosenbaum's opposition in Athens, buy some of your pictures?

A. That is right.

Q. Those were all pictures that Mr. Rosenbaum had decided were not suitable for his theatre, were they not?

A. Under the terms of the contract throughout the United States, which govern exhibitors, there are certain eliminations in their contract and those were eliminated pictures.

Q. But it is also a fact, is it not, that after Mr. Buchanan had opened this opposition theatre in Athens, you then permitted Mr. Rosenbaum to play his pictures second run in Athens in the new house that he had built there, the Plaza, which had been contracted for in the towns of Tuscumbia, Sheffield and Florence, isn't that correct?

A. I think that is correct. I don't recall that, honestly. I mean, I think that Mr. Buchanan was out of the town. Let us make this very clear: Mr. Buchanan never tried to [fol. 1520] buy second run in Athens, Alabama.

Q. Did you have the negotiations with Mr. Buchanan?

A. I did negotiate with Mr. Buchanan, personally.

Q. When you say he never tried to buy, you mean, in his negotiations with you?

A. I mean absolutely he made the statement he didn't want second run, he wanted first run, and that is the reason he was willing to buy the eliminated pictures Mr. Rosenbaum wouldn't take for a period of three *or three* years prior to that.

Q. Now, you do remember, though, that you did permit Mr. Rosenbaum to show second run pictures in his Plaza Theatre, pictures which he had previously committed for the theatres he operated in Florence, Tuscumbia, and Sheffield, isn't that correct?

A. I don't follow that at all. No. I can't agree with you on that.

Q. Perhaps I misunderstood you. I thought a few minutes ago you thought that happened.

A. No, I couldn't remember. He might have got second run in Athens, but he was not permitted to play pictures in other towns and then run them in Athens and in that way get rid of them on his contract.

Q. Does it appear from records of your Company that he had been permitted to do that?

A. I would be wrong if they showed that, but I can't recollect anything of that kind.

[fol. 1521] Q. You do keep records at the Atlanta Branch office which show whether an exhibitor has been able to discharge his commitment in one location by playing the pictures in another?

A. If such a thing is allowed, it is contrary to my recollection. That is one of the things we don't allow.

Q. Why don't you allow it?

A. Because we feel if the pictures are good enough to play in a town, they are good enough to buy in the town.

Q. I call your attention to a form here entitled "Contract Modification, dated October 23, 1940, which had a "Recommendation" which says:

> "We are substituting S-11 features over commitment in Athens, Alabama, for low allocated features in Florence, Alabama. This is customary procedure with this circuit inasmuch as it is sold with the understanding that the four contracts provide for a total number of runs rather than a set number in each house. The entire service for these accounts is on weekly payment play and all payments are up to date."

[fol. 1522] A. I would have to see the original contract. The original contract must provide that I was mistaken about that.

Q. This sheet that I just showed you is labelled "Contract modifications."

A. Well, it says here that it provided for the total number of runs rather than a set number in each house.

Q. The fact that it is necessary to make that contract modification indicates to you, does it not, now that there was a modification made?

A. Oh yes, I admit that.

Mr. Raftery: What is the date of that, Mr. Wright?

Mr. Wright: October 24, 1940.

A. The latter part of 1940, when he was just getting ready to open the theatre down there.

Mr. Armistead: May it please the Court, that is something that happened subsequent to August 11, 1939.

A. Oh yes, it all happened after Buchanan got out of there.

Mr. Mitchell: The Government proved this morning that Buchanan closed his theatre in December, 1939.

The Court: Where would that be relevant in this case now after the theatre had already closed?

[fol. 1523] Mr. Wright: I think we will show that is when the opposition theatre closed.

A. It may have if it says that in the original contract, *and if it says that in the original contract.* I am not familiar with the original contract.

Q. I call your attention to a contract modification dated October 25, 1939 which stated: "We are substituting above features in Athens, Alabama for five features not designated on Sheffield, Alabama contract. Both of these theatres are part of Muscle Shoals Theatres and inasmuch as all the exhibitors are served and paid for on a weekly payment plan and the substitution is from one contract to another, we feel that entirely justifiable. And that was the agreement upon the sale of the group S-10 contract that the exhibitor might over-play in one situation and cancel in another."

A. If that is in the original contract, and you must have it there——

Q. Well, this refers to some agreement that was outside the contract as written or it would have appeared in this contract?

A. Oh, you are wrong now. In order to keep our records in New York straight this modification has got to go through identifying the pictures; otherwise we wouldn't know which pictures they were.

[fol. 1524] Q. Well, you would know then if they appeared on the face of the contract?

A. What contract?

Q. The S-10 contract that is referred to here.

A. Oh, you see, the original contract—you wouldn't know which pictures were not being played and also what films had played in Athens unless you had some identifying form showing the home office where they played, and that is the reason for the modification. That doesn't mean the home office contract—that is a misnomer, as far as that form is concerned, because that form is used for a great many purposes.

Q. Now, you have—here is one dated December 11, 1939, which refers to cancellation of contract: "Since spot booking contracts dated 11/3/39 were forwarded to New York on above subjects, we have agreed to allow substitution of those second runs on original S-10 contracts for Muscle Shoals Theatre. We are, therefore, cancelling spot booking contracts and forwarding contract modifications covering second run."

A. In a case of that kind, there again we go back to the run because that is not the franchise. Rosenbaum had no franchise but we gave him the privilege of repeating those pictures and cancelling out those four subjects that Mr. Raftery spoke about this morning.

Q. You gave him the privilege at or about the date this cancelled contract is dated?

[fol. 1525] A. I will admit that.

Q. You stated this morning that you offered Paramount pictures to Mr. Smith on November 17th, 1938 via letter of that date from you to Mr. Smith, that was offered in evidence, is that right?

A. Yes sir.

Q. That was the first time you offered him pictures?

A. Yes sir, that is the first time I had written him. There are some salesmen's reports somewhere that came in from him and which caused us to get that record asking what pictures were open that he was interested in first run only.

Q. Have you got your salesmen's reports?

A. I don't know whether they are here. I am recalling the thing from memory; otherwise, I wouldn't have written the letter. I wouldn't have written a letter to Mr. Smith stating "I understand you are interested in some pictures second run."

Q. You think it was a salesman's report that caused you to write that letter?

A. Yes sir, I think it was.

Q. One salesman employed by you was Mr. Pickett?

A. Yes sir.

Q. I show you this letter dated November 4, 1938 from Mr. Cecil House to you and ask you if you received that shortly after the date it bears?

A. Yes sir, I remember this letter.

[fol. 1526] Q. Have you read it?

A. Yes sir, I have read this letter yesterday.

Q. Now, that you have read this letter, does that refresh your recollection as to when you offered the pictures with reference to the time you heard about the Department of Justice complaint?

A. Yes, I think,—I am inclined to think that is the first thing I got when he says he was interested in the first runs in these towns, on Tim Smith.

Q. Didn't you say something also with reference to the time you first heard of the complaint from the Department of Justice? Does that appear in there?

Mr. Wright: This letter refers to and quotes from a letter from Mr. Smith, in which the statement is made, it says: "He was in Washington, D. C. last week with the Department of Justice" and that he intends to press his claim to get available first runs and second runs. It also mentions the Department of Justice again on the second page.

A. Well, Judge, by my answer to that, I hardly would be influenced by what Mr. Smith said he was going to do to force me to offer him any pictures.

By the Court: What is the date of that letter?

Mr. Wright: This letter is dated November 4, 1938.

[fol. 1527] By the Court: Now, while we are on that point, there was an exhibit here this morning making some mention of the complaint that Mr. Roth at Gallatin had made to the Department of Justice. I believe it was Exhibit No. 150. Will you see what that says in that connection? It says that Mr. Roth has made complaint to the Department of Justice.

A. That was a memo, Judge.

By the Court:

Q. What is the date of that?

Mr. Simon: February 16, 1938.

By Mr. Wright:

Q. Mr. Morgan, the list of unplayed pictures that you identified this morning as those that were to be offered to Mr. Smith is the list that was attached to this letter from you to Mr. Unger, dated November 11, 1938, is that not right?

A. That is the list but I stated to him also in there that he should have on S-8 these pictures checked off in red, on which the film depot had prints and return it to me.

Q. You also referred in that letter to a letter you had written Mr. Phillips about the situation, did you not?

A. Yes sir, I did.

Q. Who is Mr. Phillips?

[fol. 1528] A. He is Louis Phillips, one of our legal counsel, in the legal department.

Q. You had written Mr. Phillips then, taken the matter up with the legal department before you wrote this letter of November 17th, which offered the pictures to Mr. Smith, is that correct?

A. Presumably so, yes.

Q. So that you were mistaken this morning when you testified that you had offered the pictures to Mr. Smith before you had had any knowledge of his complaining to the Department of Justice, is that right?

A. Let me ask you if you mean I had knowledge—you mean Pickett's letter, that he had been in Washington, etc.?

Q. The question speaks for itself.

A. Well, in answering——

Q. If you want to change the testimony that you gave this morning to the effect that you didn't offer or that you didn't, hadn't heard of Mr. Smith's complaint to the Justice Department at the time you made this offer of films to Mr. Smith?

A. Yes sir, I will change the testimony if that is what I said——

The Court: That is what you said. You said you had offered him pictures before you had heard he had made a complaint.

A. Well, if I said I hadn't I would like to change that statement because the letter contradicts that.

[fol. 1529] Mr. Wright:

Q. Are there any other changes that you would like to make in your testimony? Do you think of any other mistakes you might have made, either on my examination this afternoon, or on the examination this morning?

Mr. Armistead: Now, may it please the Court, I object to the question—Do you want to take back anything you testified to this morning? That is what it means; and I object to the form of the question.

Mr. Wright: ——

Q. I am now asking if there are any other corrections that occur to him that he now wants to make in his testimony?

A. Not that I know of.

Mr. Wright:

Q. That is all subject to the right to re-examine Mr. Morgan on documents counsel produced this morning. I believe you referred to the Crescent circuit as a small circuit as compared to what you would call good size circuits in the United States?

A. I said the Crescent circuit, Sudekum circuit, was considered a very, very small circuit.

Q. Now, how many independent circuits can you name? [fol. 1530] A. I can name quite a few: Robb and Rowley, Texas; Griffith in Texas, Griffith in Oklahoma and Kansas City.

Q. Wait a minute; the Griffiths are all one circuit?

A. No, sir, they are not all one circuit, I beg your pardon, Mr. Wright; they may be in your set-up, but in our selling, they sell R. E. Griffith in Texas and sell L. C. Griffith in Oklahoma and Texas.

Q. Any others?

A. You take Roy Martin; he is larger than Crescent.

Q. Roy Martin?

A. Yes.

Q. Where does he operate?

A. In Georgia.

Q. How many theaters does he have?

A. 50 or 55 theaters.

Q. How many theaters does the Crescent have?

A. The Crescent itself has a great many; are you talking about Rockwood and Crescent?

Q. Crescent and Rockwood?

A. They are separate circuits.

Q. Well, you sell them as a one circuit?

A. No, we sell Tony Sudekum for the Crescent, and Mr. Sudekum never buys for the Rockwood.

Q. Mr. Morgan, do you want the Court to understand that [fol. 1531] you never discussed the Rockwood franchise that you made that is in Court with Mr. Sudekum?

A. No, I don't want the Court or you to understand that, but I want the Court and you to understand that the terms were settled with Mr. Stengel and not with Mr. Sudekum.

Q. And the fact they were dated that same date is a pure coincidence?

A. No, sir, it isn't a pure coincidence; they were all negotiating at the same time, but as far as the film terms, the deal was settled with Stengel.

Q. Now, have you named all of those circuits?

A. No, I haven't. I am afraid you are trying to tax my memory a little too much, Mr. Wright; if you would like to give me time, I could give you a considerable number of them.

Q. I wish you would give us a list of those you regard as larger than the Crescent circuit; and when I say the Crescent circuit, I am referring to Mr. Sudekum and his affiliates.

A. I understand; I have mentioned Robb and Rowley, and Griffiths, Schine and many others in the northeast, New York City.

Q. Could you supply us with a list of the others?

A. I beg your pardon, I didn't get that?

[fol. 1532] Q. Will you supply us with a list of the others?

A. Yes, we will.

Mr. Raftery: Is this for the government for the purpose of cataloguing purposes? I can't see the need of it.

Mr. Armistead: I would like also to ask when the Government asks for that list, whether they want the number of changes, the amount of revenue that comes in, and the amount of seats in the theater.

The Court: No, sir; the witness was asked, on account of the statement the witness made on cross-examination how the Crescent circuit compared with a small circuit.

A. Judge, can I explain exactly what I mean by a small circuit?

The Court: Yes, sir.

A. We stayed out of the circuits, including Rockwood and all, because we wasn't satisfied with them, we stayed out of the Warner circuit to the tune of three million dollars for one solid year; and we stayed out of others. I don't think, if we couldn't make the proper deal with the Crescent cir-[fol. 1533] cuit that we would hesitate to stay out; that was the point I was trying to make.

Mr. Wright: I move to strike out this gratuitous argument this witness has furnished us as to that.

The Court: Yes.

Mr. Wright:

Q. One more question about your relations with the Crescent: When you got back into the Crescent with the franchise, you also made a deal with Mr. Sudekum to turn over the Paramount Theater here in Nashville to him to operate it, isn't that correct?

A. That is right, Mr. Wright.

Q. And that is one of the reasons you were able to get back into the circuit, isn't that right?

A. That is correct, Mr. Wright.

Mr. Armistead: Now, here is the document counsel for the Government asked this witness to produce; and I am informed it was subject to inspection by the Government over a week ago, and in view of the fact they want to reserve further examination until after they have examined it, I will [fol. 1534] hand it to Mr. Wright now, and if he desires to examine it, and after he examines it, I will have a few questions I would like to ask him.

Mr. Wright:

Q. I will hand you this document that Mr. Armistead has just handed us, and ask you to tell us what that is?

A. Mr. Wright, this is what we call a contract recap. that must be attached by the branch office to the contract when it gets to the district office; when it comes to the office with the recommendations for making this contract——

Q. Who performs that?

A. The branch manager performs it for the salesman.

Q. Who performed that?

A. William Bugie, the Branch Manager at Memphis.

Q. Branch Manager at Memphis?

A. Yes, sir; and it has the particular salesman's name on the back.

Q. Can you see anything on that recommendation there, anything on that paper, which suggests to you that the branch manager didn't want to sell Mr. Lawing and two others——

[fol. 1535] Mr. Armistead: Just a minute——

. . . . . .

Q. Point it out; read it?

[fol. 1536] A. I will read it: "The exhibitor has the right to decide."

Q. Can you read the rest of it?

A. Do you want the rest of it read.

Q. Is that all on there?

A. You asked me if there was anything else on here——

Q. Just a minute; is there anything on which you base your testimony that Mr. Lawing by the exercise of his buying power had been able to compel you to sell him both season's product?

A. I don't think I said, Mr. Wright, that I formed my entire opinion from this piece of paper this morning; if I did I didn't mean that, I was in Memphis every two weeks, and I was pretty familiar with what was going on.

Q. Your testimony now is—what you are telling is not based on the records but what Mr. Bougie told you then?

A. I will say this: it was based on my reading these records and my knowledge of the situation, because, obviously you can't write everything on here that I know.

Q. What was it you knew that doesn't appear on that?

A. I knew they hadn't been able to sell the man the previous year's product; I knew I had discussed the contract, as I had discussed many others before them that went through.

[fol. 1537] The Court: What do you mean by buying power.

A. I think I explained that this morning.

The Court: You may have explained it satisfactorily to Mr. Wright, but you didn't explain it satisfactorily to me.

A. What I mean by this—I will make it a little plainer; there is always a great effort made by the salesmen and the branch manager, and also by the home office, to sell every possibility of the year's product to a representative in the town.

The Court: Well, what is buying power supposed to be based on?

A. That is exactly the point; us wanting to get into this town, with a good reputation; knowing that, he would want the same power, to get the same deal for himself too.

The Court: All right, sir.

A. There is something else on here, however, Mr. Wright, that I would like to read in answer to your question: "We couldn't sell this exhibitor S-5"; in fact we had to cancel quite a few S-4" etc.

[fol. 1538] Mr. Wright:

Q. Is there anything unusual about that? Anything unusual about that?

A. Well, it is not usual; we will only occasionally make adjustments for exhibitors that we sell.

Q. Mr. Morgan, I dare say there is one received in the Paramount office every day, is there not?

A. Well, it is true, but it is not a practice Mr. Wright; but if is done.

Q. It is done frequently, isn't it?

A. Well, it is done frequently, if you want to consider 15,000 accounts, yes; it depends on what you call frequently.

Q. You did approve the deal as agreed?

A. Yes, I did approve the deal.

Mr. Armistead: Now, May it please the Court, I want to make this statement, and of course, if, after the Government checks this contract recapitulation concerning Lawing deal and the contract recapitulation concerning Crescent which had the product of Paramount for the year 1935-1936 in Brownsville, Tennessee, I see that the Lawing contract, recapitulation shows that Paramount received $581.00 for the 1934-1935 product, and it received from Crescent for the 1935-1936 product $785.00.

[fol. 1539] Mr. Armistead:

Q. Now, Mr. Morgan, you were questioned about a letter of November 4, 1938, from which there was a paragraph read to you, I will ask you if that letter, does not contain this paragraph, if this is not contained in it?

> "Smith will not buy now. Claims he must have pictures for Morristown, Harrim-n and Newport, and that he prefers to wait and see what happens in those three towns, as he may have to consult the distributor in Fountain City who supplied him in those three places. I think you will agree to that? I notice in the letter he refused to buy at Fountain City unless we sell him at the other towns."

A. Yes.

Q. I will ask you in comparing the revenue that Paramount received from a theater in one town with the amount of revenue it received next year, from a theater in that town,

in which you may have a franchise, if that is a fair percent, if on the contrary it is not necessary to take into consideration what the distributor will derive in revenue through that whole four or five year period, the term of the franchise?

A. Well there is no question of that, that is one of the reasons we made our franchises, as I said this morning.

Q. Was to insure a business in those towns for a period of five years?

A. Yes, sir.

[fol. 1540] Q. And those franchises you have with Crescent go up five per cent every year?

A. Yes, sir, it does, it accumulates.

The Court: Of course it would be more to the benefit of your company if they were doing business with an independent in a small town, which also had a chain house there, and the chain had fifty other theaters, it certainly would be more to your benefit to make the franchise with the chain of theaters and take the contract away from the independent in this small town and put it with the chain, in order to get the other forty-nine theaters, wouldn't it?

A. That is true, Judge, but the record shows we stayed with the independents all through our negotiations or deals, our dealings, rather, with the Crescent Amusement Company, over the nine years I was in the south, competitive places, we never took the pictures away; I went back clear to the time this morning, we never took the pictures away at Earlington, or at Gallatin; they played the pictures the first year of the franchise. Mr. Sudekum came in and we offered him a split. We couldn't offer him the four of course, but we never took the pictures away from those exhibitors.

Mr. Armistead:

[fol. 1541] Q. Did you ever hear that the theater playing Paramount product, made only a gross of forty-five dollars out of a film, when he was paying thirty-five dollars?

A. He made the complaint and I went up there and sent Mr. House to recheck those figures with Mr. Roth, and they are contained in that correspondence, and I think that is about the proportion.

Q. Did Louis Rosenbaum ever have a franchise with Paramount?

A. Never had a franchise, he had a contract and deal I think at one time, I think he has got a contract yet, a year deal now.

Q. Just an agreement?

Q. That is all, may it please the court, a deal.

Mr. Armistead: That is all.

Mr. Mitchell: May I ask the witness a question?

The Court: Yes, sir.

Mr. Mitchell:

Q. I am sure you know Louis Rosenbaum, of the Muscle Shoals theaters?

A. Yes, sir, I have known him a long time.

Q. In some of your recent testimony there was a suggestion as I understood it, that at the time of the execution [fol. 1542] of a franchise with Crescent, and franchises were executed with other Crescent affiliates, your statement to that effect did not include Muscle Shoals theaters, or Rosenbaum's?

A. No, sir, did not include all the other affiliates?

Q. As a matter of fact in the history of your office Rosenbaum has negotiated his own contracts?

A. That is correct, we have never made a contract with anybody except I had with Mr. Rosenbaum.

By Mr. Wright:

Q. Regardless of the negotiations you had with Mr. Rosenbaum, were they discussed with Mr. Sudekum?

A. No, they never were.

Q. At that time or any other time?

A. No, sir, never were.

Q. Mr. Sudekum was not interested in the negotiations with Mr. Rosenbaum?

A. Apparently not.

Q. Did you know his wife owned any of the theaters which Mr. Rosenbaum had?

A. Mr. Wright, I never knew that until after we had that deal negotiated.

Q. How long had you been a close friend to Mr. Sudekum?

A. For twenty-one years.

Q. That fact did not appear?

[fol. 1543] A. No, sir.

Q. You did recall that Mr. Sudekum had been president of the Muscle Shoals Theater Company from the time of your connection?

A. I thought Mr. Sudekum was interested in that someway, I found out after the franchise was closed, Mr. Sudekum—it was Mrs. Sudekum, Mr. Sudekum never told me that.

Q. You were not aware of the fact that Mr. Sudekum's interest had been transferred to Mrs. Sudekum?

A. I still think Mr. Sudekum was the one that was in there.

Q. Is your testimony the same as to the period with Muscle Shoals Theaters Corporation, following the operation of the theaters, you never discussed that Muscle Shoals deal with Mr. Sudekum?

A. No, I never discussed that Muscle Shoals deal with Mr. Sudekum.

Q. Not even when he was president?

A. No, sir, not even while he was president, I couldn't tell you when he was president.

Mr. Mitchell: One other question, May it Please the Court.

Q. There were years in which Crescent did not buy your product but Muscle Shoals Theaters did?

A. That is correct, I think, but I can't remember positively.

[fol. 1544] (Recess.)

The Court: Call your next witness.

Mr. Wright: If the Court please, we are now going to offer the rest of the Paramount correspondence, which can be done without the necessity of introducing witnesses, due to the fact that Mr. Armistead has kindly agreed to stipulate that if these men were called they would testify that they wrote the letters on or about the date they bear in the ordinary course of business.

The first letter is dated February 10th, 1938, from Mr. J. J. Unger to Mr. Oscar A. Morgan, and the stipulation for that letter reads that if Mr. Unger were called to the stand he would testify that at the time he wrote this letter, February 10, 1938, he was the eastern division salesman of the Paramount Pictures, Inc., of New York City, New York, that he wrote the letter pursuant to his duties as such

manager, and that the letter was received by Mr. Morgan. I will ask to have it marked.

The Court: Suppose you just go ahead and read it, and they can be marked that way, and we will save a little [fol. 1545] that way—they can be marked while you are reading the next one.

Mr. Waller: I think, Your Honor, we ought to read into the record the stipulation.

Mr. Wright: I thought I did.

Mr. Waller: That stipulation is made with certain reservations.

The Court: Exceptions as to competency, relevancy and materiality.

Mr. Waller: It is a little more than that, of course we do not concede that *that* Paramount was or is a co-conspirator, or that oral or written declarations of Paramount officers or employees are competent against our clients, and we reserve the right to object to said letters on that ground, as well as to object to any and all statements contained in said letters, which would be hearsay, and because the evidence would otherwise — objectionable, if the writers of the letters were testifying in person.

The Court: You can read the letter and I will pass on any [fol. 1546] objection.

Mr. Wright: Letter of February 10, 1938 of Mr. Unger to Mr. Morgan, has attached to it a letter from Mr. Roth dated January 22, 1938 to Mr. Unger, which is already put in evidence.

Mr. Unger's letter to Mr. Morgan reads as follows:

> "Dear Mr. Morgan: The attached copy of letter speaks for itself. Was it absolutely necessary for us to include Gallatin in the Sudekum franchise?
>
> "Please write me in connection with the attached so I may reply intelligently to this exhibitor.
>
> Very truly yours."

The next letter written by Mr. Unger to Mr. Morgan is dated November 23, 1938, and carries the same stipulation with reference to what Mr. Unger would testify to if called. The letter is as follows:

[fol. 1547] Mr. Wright: We counted in four of the letters, and we are using only two of the four, as I understand.

I will ask to have this marked as Government Exhibit No. 154, and is as follows:

"DEAR OSCAR: I note in your letter of November 14th regarding the Tim Smith Circuit, in the next to the last paragraph that you say that Mr. Sudekum "has a refusal on all second runs" in Paragraph E of Article 8 in our contract. It would seem to me that this is a very bad clause inasmuch as it is impossible for your Exchange to make a sale until after Crescent Amusement Company waives their right to those second run pictures.

I think the way to handle this would be for Crescent Amusement Company to send in their rejections of second run pictures at least quarterly and then you would be able to sell these pictures to the Tim Smith Circuit in the same way. What do you think of this idea? I speak of this idea so as to keep out of constant legal trouble.

Yours very truly."

That is all that we are offering on Mr. Unger.

Now, we have some more letters from Mr. D. Prince, who was at the time Branch Manager of the Paramount Ex- [fol. 1548] change at Atlanta; the first one is dated April 12, 1934, a letter from Mr. D. Prince to Mr. J. T. Howard, Branch Manager, Indianapolis Exchange.

The same stipulation applies, that is that Mr. Prince was at that time Branch Manager of the Paramount Exchange at Atlanta, that he wrote the letter on the date of April 12, 1934, pursuant to his duties as such Branch Manager.

The Court: And the same exceptions noted above.

Mr. Wright: This letter reads as follows:

DEAR MR. HOWARD: Answering your letter of the 9th, about the Sudekum Circuit with headquarters in Nashville, the situation is simply this:

Prior to the time that Paramount owned its own theatre in Nashville, Sudekum had only one competitor in the first run field, that being the Loew house in Nashville, and up to the time our theatre was built, Sudekum bought all of our product for his entire circuit. Even after our theatre opened, so long as we operated it ourselves, Sudekum continued to buy our

product, with the exception of Nashville, where Paramount pictures play the Paramount Theatre.

[fol. 1549] However, when we turned our theatres over to another party to operate for us, as we did when we made the deal with Bob Wilby, who operates the Nashville house in conjunction with a number of other houses in this territory, Sudekum felt that he should have been the man who should have been taken into the partnership arrangement. That was two years ago, and his contention is now that so long as he must do without Paramount product in Nashville, he can do without Paramount product throughout the remainder of the circuit. We have been out of the Sudekum Circuit entirely for two seasons. I am hoping that something will be worked out so that we will not have to remain out for another year.

Very truly yours, —— ——."

The next letter is one from Mr. Prince to Mr. Howard, Branch Manager, Indianapolis, dated October 16, 1935 and carried the same stipulation with reference to what Mr. Prince would testify to, if called.

It is as follows:

"Dear Mr. Howard: Your letter of October 14 came to me today, and I can appreciate just exactly what your position has been so far as Earlington and Madisonville are concerned.

[fol. 1550] We have had identically the same situation in several spots here in the Atlanta territory. For instance, being unable to sell Sudekum in any of his towns for the past three years, we have been able to make some very satisfactory deals with towns like Hartsells, Alabama, which is about eight miles from Sudekum's town of Decatur, Alabama. The same thing applies to the independent account at Attalla, Alabama, which town is just about five miles from Gadsden, Alabama, another of Sudekum's towns. Inasmuch as Tony Sudekum bought practically everything excepting Paramount, naturally these little independent exhibitors became exceptionally good accounts of ours. Each year they would buy, fearing that Tony Sudekum would buy Paramount, but hoping he would not.

I can appreciate the fact that in your situation it is a little bit different, because, while the Sudekum busi-

ness involves some $40,000.00 or $45,000.00 for the Atlanta Exchange, the little bit of business you get out of Madisonville does not even compare favorably to the business you have been getting from Earlington. It is just one of those situations where possibly you get a little bit the worst of it, while the Atlanta Exchange derives most of the benefit. However, the Company [fol. 1551] gets a lot more money in the long run.

No doubt you know that Sudekum is a tough buyer. He is a marvelous fellow personally—the kind of fellow who would rather give you a $10 bill out of his pocket, rather than agree to pay 50¢ more on a newsreel contract.

He also thoroughly understands the situation between Madisonville and Earlington, and I think after the three pictures mentioned in your letter have played, everything will go along without any difficulty whatsoever.

Kindest personal regards,

Very truly yours —— ——."

The Court: Who wrote that letter?

Mr. Wright: That was from Mr. Prince, Atlanta Branch Manager, to Mr. Howard, Indianapolis Branch Manager.

That is all we have for Mr. Prince.

The next we will offer is a memorandum dated September 2, 1938, made by Mr. William F. Bugie, Paramount Branch Manager, at Memphis, Tennessee. The stipulation referred to, it is a letter, but I believe that it appears on its face that it is a memorandum, and the stipulation will be that Mr. William F. Bugie, if called to the stand, would testify that on that date he was Manager of the Paramount Branch [fol. 1552] at Memphis, and that he wrote this memorandum dated September 2, 1938, pursuant to his duties as such Branch Manager.

The memorandum is as follows:

"McKenzie, Tenn.

On 8-9 this account had a prior run over Huntingdon, Tenn. This season all nearby Sudekum towns have a clearance over this town. This exhibitor naturally resented being handicapped and being placed in the position of finding it necessary to play Para-

mount pictures after Huntingdon, Paris, and Milan, who attract theatre patrons from the same nearby small towns that in the past he has been able to gain revenue, for the reason that he would play the product prior to them. To get the exhibitor to continue to play Paramount pictures, it was necessary for us to grant some concessions.

After several visits to the town, we have been able to work out a deal for 40 pictures at the best rental the exhibitor feels he can pay under the clearance that has been set against him. We also had great resistance from the exhibitor in buying Paramount pictures as he bought his Metro and Fox deals without any clearance set up as Sudekum has not apparently made his next [fol. 1553] season's deals with these companies and they therefore did not provide a clearance for Sudekum.

This is the best deal that we can work out with this exhibitor under the circumstances, and we therefore recommend that it be approved."

The next is a letter dated April 2, 1935, from Mr. Bugie, to Mr. Oscar A. Morgan, which is offered now under the same kind of stipulation with respect to what Mr. Bugie would testify to, if called. The letter is as follows:

"DEAR MR. MORGAN: I have not heard anything more as to whether Mr. Sudekum has closed for our S-7 product in Brownsville, Paris, Dyersburg, or Union City.

Both the Union City and Brownsville exhibitors have been in the office several times trying to learn whether or not our S-7 product is available for them.

I have advised them that we have a deal pending with Mr. Sudekum for Brownsville and Union City and until this is either rejected or approved, I cannot consider service in these towns.

Will you kindly advise me when these deals are approved so that I may act accordingly.

Very truly yours."

[fol. 1554] The next is a letter dated January 27, 1939, from Mr. Bugie to Mr. H. F. Wilkes, at the District Office,

which is being offered under similar stipulation. It is as follows:

"Dear Mr. Wilkes: Mr. J. D. Henry is constructing an opposition theatre to the Crescent Amusement Co., in Union City.

He has requested that we sell him service and has offered to pick up She Asked For It, Partners In Crime, Daughter of Shanghai, Bulldogs Peril, No Man of Her Own, Blossoms on Broadway, Bulldogs Revenge, Shanghai Express, Sign of the Corss, and Horsefeathers at a rental of $12.50.

He has, also, offered to select 16 pictures from the S-9 releases—5 to be at $15.00, against 30% of the gross; 11 at $15.00 flat, together with 32 selected Shorts at $2.00 each. He has also, agreed to buy a selective deal on the S-10 product second run—30 pictures, rentals from $13.00 to $15.00 with 6 of the pictures to carry a percentage sharing agreement.

The Sudekum franchise provides for an option on second run in any of his towns.

Will you kindly advise me whether I should consider a second run in any of his towns, from Mr. Henry. [fol. 1555] Also, whether I should sell him the above listed first run pictures, which were passed up by Sudekum, under his Code elimination privileges and a few reissues, which Mr. Sudekum would not consider.

The theatre that Mr. Henry is constructing will be called the Roxy Theatre and will open about February 15th at an admission price of 25¢, however, if Mr. Sudekum opens up another house he is anticipating constructing in the town and charges in this "B" house an admission of 15¢, Mr. Henry would want the right to show any product played second run at 15¢.

Very truly yours . . . ."

Mr. Wright: Those are all for Mr. Bugie.

The next letters are from Mr. J. T. Howard, who was the Branch Manager at Indianapolis, Indiana, for Paramount. The first is dated September 20, 1935, from Mr. Howard to Mr. C. M. Reagan at the Home Office. The stipulation is, if Mr. Howard were called, he would testify that he was Manager of the Paramount in the Indianapolis Branch at

the time he wrote this letter and that he wrote it pursuant to his duties as such Branch Manager, and that it was duly received by Mr. Reagan. The letter is as follows:

[fol. 1556] "DEAR MR. REAGAN: I have your letter of the 16th wherein you advise us that it will probably be necessary for us to make some concession in price at Earlington as a result of the Company selling Madisonville, Kentucky our S-7 product. There is no doubt but what this revision will be necessary.

However, in comparing the S-7 deal in Madisonville with that of Earlington, it seems rather unjust to allow Madisonville clearance over Earlington, providing Madisonville dates their pictures within sixty days of national release date. I note the total revenue which we will receive for S-7 in Madisonville is $1590.00, whereas the Earlington S-7 total was $1660.00. Further, Earlington is a 100% sale whereas Madisonville is a partial sale. Also prices on Color Classics in Earlington is $5.00 as compared to $2.50 in Madisonville, and prices on Popeye and Betty Boop cartoons in Earlington are $3.75 as compared to $2.50 in Madisonville. Our minimum short price is $2.50 in Earlington as compared to $2.00 for a partial short deal in Madisonville.

At any rate, we will try to weather the situation as best we can, although the above facts do make this matter look very unfair.

Yours very truly * * *."

The next letter is from Mr. Howard and is dated October [fol. 1557] 14, 1935, and addressed to Mr. D. Prince, Branch Manager at Atlanta, Georgia and is being offered under a similar stipulation.

The letter is as follows:

"DEAR MR. PRINCE: Under date of October 3rd I wrote you relative to some pictures which we had set in at Earlington, Kentucky prior to the Madisonville date. I am a little bit apprehensive that my letter was not entirely clear to you, and accordingly I want to explain further.

For the past few years Earlington, Kentucky has banked on Paramount as the back-bone of his business, because our product was not playing in Madisonville.

He made the same plans for 1935-1936 and we sold him at a very early date. All of his dates had been set in when you advised us that you had closed with Sudekum for Madisonville. The result was if we had unceremoniously yanked all of the dates on Earlington, we would have placed him in a very embarrassing position by forcing him to make quick deals with other companies who would take advantage of him, knowing his desperate need for quick bookings.

[fol. 1558] Accordingly, we agreed to allow Annapolis Farewell to stand as booked October 19-21st, Two for Tonight October 26-28th, and Last Outpost November 2-4th. These three pictures are either day and date or just ahead of Madisonville. After these pictures have played, all future bookings in Earlington will be after Madisonville, according to the terms of the clearance on Madisonville contract.

Earlington, Kentucky has been a very splendid account for us and we really felt obligated to assist him as outlined above. Furthermore, our Earlington contract totaled more money than the revenue we will derive from our Madisonville deal. I trust that you can make Mr. Sudekum see our problem on the three pictures named above.

Kindest regards.

Yours very truly * * *."

[fol. 1559] Mr. Wright: We have here a letter from Mr. Reagin. I think he will be here Wednesday. I think that completes our offer of Paramount correspondence.

I think that, in addition to the correspondence, a stipulation has been offered with respect to two spot booking contracts, both dated March 30, 1939 for the Ritz Theatre operated by Crescent Amusement Company at Morristown, Tennessee.

The Court: Those were the contracts that were objected to sometime ago, were they not?

Mr. Wright: Yes sir, I believe they were and the stipulation with respect to those is, I believe, that Mr. J. H. Kirby, the manager of the Paramount Atlanta exchange at the time these documents were prepared would, if called, testify that he held that position and that these contracts were prepared pursuant to his direction and the recommendations which appear on here were made by him in the course

of the performance of his duties as such branch manager, with the same reservations as they other stipulation.

These documents refer to, each refers to five different pictures and each says: "We are spot booking the above group S-10 features for repeat run engagements at terms [fol. 1560] equal to the Hopalong Cassidy situations. This is additional business and is in accordance with the general agrement made with Sudekum at the time the five year franchise was drawn."

(Documents filed and marked as Exhibits P-33 and *P*-33.)

Now, call Mr. Willingham.

Mr. Waller: Before the other witness is called, I want to call your Honor's attention to the fact that in these letters, some of them written by branch managers and others, there are a great many opinions expressed by different persons connected with the Company. In these last exhibits there was the construction of a written contract by a branch manager. We insist that all of that is incompetent, would be incompetent if the witness were here.

Now, in addition to that, with respect to the documents as a whole, we, of course, are insisting that any possible relevency would be confined to the alleged conspiracy between Paramount and the defendant exhibitors. It couldn't possibly come in on the other conspiracies alleged, and particularly on a conspiracy which the Government alleges took place among the defendant exhibitors themselves. Of course, the Government can't prove a conspiracy among [fol. 1561] the defendant exhibitors by what a representative of Paramount said. Of course, they can't prove any kind of a conspiracy by the declaration of a co-conspirator. If the Government has proven a conspiracy between Paramount and Crescent these letters wouldn't add anything; the Government has proved their case. The only relevancy then would be to show some overt act and an overt act is not necessary, so it looks like to me they have got a dog chasing his tail. In other words, they are introducing these letters saying they are going to make them competent by proving a conspiracy just like they have been doing thoroughout the trial. All of these declarations or contracts made by Paramount with independents and what not are introduced on the theory that they are going to make them competent. Now, they introduce these letters on the theory they are going to make them competent by

proving a conspiracy. Now, it seems to me what the Government is doing is introducting letters and saying they are going to make them competent and then they say "We have proved a conspiracy by the letters." Now, I want to point that out to your Honor because I think that is the theory on which they are being introduced.

[fol. 1562] J. F. WILLINGHAM, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wright:

Q. Will you state your name and address, please?

A. J. F. Willingham, 158 Vance Street, Memphis, Tennessee.

Q. What is your occupation?

A. Manager of Metro-Goldwyn-Mayer, Memphis.

Q. You are employed by Loew's, Inc.?

A. Yes sir.

Mr. Raftery: Mr. Wright, this evidence is not being offered against Columbia, Universal or United Artists?

The Court: No sir.

Mr. Waller: I would like to ask if the Government agrees with my statement, if the gentlemen even contend that the evidence is admissible on the blanket conspiracy, that is, the conspiracy among the defendant exhibitors?

Mr. Wright: We certainly do not.

Mr. Waller: In other words, they are insisting that a representative of Paramount can write a letter back four [fol. 1563] or five years ago and that that letter is competent in the alleged conspiracy among Crescent, Rockwood, Sudekum, etc., that is the Government's contention? Of course, we are objecting to the evidence on that ground.

By Mr. Wright: (Resuming examination):

Q. Mr. Willingham, were you the branch manager of Metro at Memphis on May 30, 1935?

A. Yes sir.

Q. I will show you this memorandum of cancellation of contract and ask you if the initials JFW that appear there were put on there by you?

A. Yes sir.

Q. That was prepared under your direction and in the course of your duties as Memphis branch manager?

A. Yes sir.

Mr. Wright: Do you want to cross-examine him on each of these?

Mr. Waller: No, I would suggest you go ahead and put them all in.

By Mr. Wright:

Q. How long have you been branch manager for Loews at Memphis, through what period?

[fol. 1564] A. September, 1926 to date.

Q. I hand you a letter dated July 2, 1935 from you to C. E. Kessnich at Nashville, Tennessee and ask you if you signed and wrote that letter on or about the date it bears.

A. I did.

Q. And that letter was written in the course of the performance of your duties as Memphis branch manager?

A. Yes sir.

The Court: Let it be marked for identification.

(Letter marked Government's Exhibit No. 163.)

By Mr. Wright:

Q. I will also show you a letter from you to Mr. T. J. Connors at the home office dated July 13, 1935, and ask you if you wrote that letter on or about the date it bears, in accordance with the performing of your duties as Memphis branch manager?

A. Yes sir.

Q. I also show you a letter dated July 30, 1935 from you to Mr. Kessnich at Atlanta, Ga. and ask you if you wrote that letter in the course of your duties as branch manager at Memphis?

A. Yes sir.

Q. I also show you a letter from you to T. J. Connors at the home office dated July 31, 1935 and ask you if you

wrote that letter to Mr. Connors and if it was in connection with your duties as branch manager at Memphis.

[fol. 1565] A. Yes sir.

Q. I also show you letter dated November 26, 1935 from you to Mr. Kessnich at Nashville, Tenn. and ask you if you wrote that letter on that date in the course of your duties as Memphis branch manager of Metro?

A. Yes sir.

Q. And I also show you a letter from you to Mr. H. Postman at the home office in New York dated January 22, 1936 and ask you if you wrote that letter on that date in the course of performing your duties as Memphis branch manager?

A. Yes sir.

Mr. Wright: I will offer these in evidence as Government's Exhibits Nos. 162 to No. 168, inclusive.

Mr. Waller: We make the same objection.

The Court: Suppose you read them one at a time so that I can see what they are. The reason I like to have those exhibits read at the time is that I am going to endeavor to decide this case within a day after you gentlemen complete your argument, and if I have to read all this mass of correspondence, and records in order to decide the case, [fol. 1566] I will be some months in getting that done, and if I can hear them as I go along and make notes as to the ones I think are important, why, it will enable me to facilitate the deciding of the case. I am just afraid that if I take this case under advisement that I don't know when I will be able to wade through all these documents, letters and testimony and decide it, and, as I say, I am going to give you gentlemen ample opportunity to argue it just as much as you feel it is necessary to, and then I am going to try to decide it or rather I am going to decide it. I don't know whether it will be a very satisfactory decision to some parties or not but——

[fol. 1567] Mr. Wright:

Q. With reference to the cancellation of contract dated 5/3/35 with reference to the Old Opera House at Union City operated by Crescent Amusement Company, second run, contains the following statement——

The Court: What exhibit is that?

Mr. Wright: That is Exhibit No. 62.

"This second run house was opened by Mr. Sudekum in opposition to an independent exhibitor who had opened a theater in this situation in opposition to Mr. Sudekum's first run house. In as much as Mr. Sudekum has now closed this second run operation, we are cancelling the contracts to clear our records.

The Court: Now, how is that? That is the opinion of the man that made that contract?

Mr. Wright: May it please the Court, I think it shows a high degree of cooperation between Mr. Sudekum and Metro and Crescent Amusement Company, which, after the oppo- [fol. 1568] sition has been disposed of, why he, then, Mr. Sudekum, was then closing the house he had opened for that purpose; and he was able to cancel his contract without any liability.

The Court: Read that again, please, sir?

Mr. Wright: "This second run house was opened by Mr. Sudekum in opposition to an independent exhibitor who had opened a theater in this situation in opposition to Mr. Sudekum's first run house. Inasmuch as Mr. Sudekum has now closed his second run operation, we are cancelling the contracts to clear our records."

The Court: Well, I think that is competent; that shows the contract was cancelled; that is, the contract with the Opera House?

Mr. Wright: This is entitled "Cancellation of Contract" and then specifies the list of numbers of films, rentals of the pictures which were cancelled, etc.

The Court: All right.

[fol. 1569] Mr. Wright: The next letter is dated July 2, 1935, and is from Mr. Willingham to Mr. O. E. Kessnich, Nashville, Tennessee, as follows:

"Dear Mr. Kessnich:

Received your wire stating you and Mr. Avey are leaving this afternoon for Nashville, Tenn. and if I wish to join you there Wednesday morning, I may do so.

Upon second thought, do not believe I would be doing anything but wasting the company's money by coming

over there as you and Mr. Avey can take care of the situation very capably without my presence. I know of nothing I could possibly do other than what you will do or already have done, in order to consum-ate a deal with Mr. Sudekum.

I do, however, want to drop one thought and this is, we have a customer in Brownsville, Tenn. that has been playing our product ever since he has been running the theater there 100 percent. He has bought and played everything we have released without any trouble every season. Now, Mr. Sudekum has gone into the situation and sat down on top of him. Miss Brockett was in our office and told the writer that Mr. Sudekum wanted us to hold the product for him. Therefore, we have refrained from negotiating a deal [fol. 1570] Mr. Lawing, although he has requested us to write up a deal many times.

Mr. Sudekum has aligned himself now with Mr. Pouncey and we understand they are in partners on a 50/50 basis. Mr. Pouncey owns the Milan Theater, Milan, Tenn. He and Mr. Sudekum bought both theaters in Humbodt, Tenn. the Rex and the Main Street. Mr. Pouncey has not bought our product in Milan for two years and advises his time in Milan is filled for the 1935-36 season and he cannot possibly use our product, but could work out some kind of a deal with us for Humboldt, due to the fact that they have two theaters there.

We do not believe it would be fair for Mr. Sudekum to be privileged to buy the product in Humboldt, where he has two theaters and leave us out of Milan, Tenn., and at the same time for us to sell him the product in Brownsville, Tenn., in preference to a customer that was there before he was and wants to buy our product. Won't you, therefore, please insist that Mr. Sudekum buy our product for both Milan and Humboldt if you sell it to him for Brownsville.

Will also appreciate your having Mr. Sudekum instruct Mr. G. W. Haynes who has also recently aligned [fol. 1571] himself with Mr. Sudekum as a partner on a 50/50 basis, to buy our product at the same terms as Mr. Sudekum pays, that is, insofar as the number of percentage pictures, etc. are concerned. The towns

where Mr. Haynes and Mr. Sudekum have theaters on a partnership basis are as follows:

Tiptonville, Tenn.	Strand Theater
Ridgely, Tenn.	Palace Theater
Earle, Ark.	Strand Theater
Parkin, Ark.	Ritz Theater
West Memphis, Ark.	Strand Theater

They also have a first run house in Fulton, Ky. but we do not want to do business with them in this situation as we have a franchise with Warner, but in all other towns listed above in which Mr. Haynes is operating, we believe we are entitled to representation.

Attached you will find cut-offs on all of these towns so you will be able to talk intelligently as to price and terms with Mr. Sudekum.

The writer is leaving town for a trip through Arkansas and believe from this point on, you will be able to see a decided improvement in the sales of the Memphis Office. Note a national outdoor billboard campaign has already been posted on China Seas in this territory. This is going to be a great help and [fol. 1572] stimulant to our sales and we are going to take advantage of it as quickly as possible.

Mr. Waller: Your Honor notes in that letter, that the writer of that letter says Mr. Lawing has played the product 100 per cent. Of course, the records would be the best evidence of whether he did or did not play 100 per cent. That letter would not be the best evidence on that. We want the records on that. The writer of the letter, of course, was the manager of the branch office at Memphis.

The Court: I overrule the objection.

Mr. Wright: The next letter is dated July 13, 1935, marked Government's Exhibit 164, from Mr. Willingham to Mr. T. J. Connors:

"Dear Mr. Conners"—The first paragraph I don't think is material. I will try to eliminate from now on that that is not material. If they want to read them they may.

"We can sell the Southland Theater, Brownsville, Tenn. any time we are agreeable to doing business

with the exhibitor we have been doing business with for years.

[fol. 1573] We have deferred making a deal with this exhibitor up until the present time due to the fact that Mr. Sudekum has opened an opposition house in this situation.

Now that Mr. Kessnich has visited Memphis he has instructed us to go ahead and sell the Southland Theater in Brownsville and we will be able to send you a deal next week.

We have not had representation in Milan, Tenn. in two years. This exhibitor is now a partner to Mr. Sudekum but he still does all buying and booking. He has bought all product he can use for next season, therefore, has left us out in the cold another year."

The next letter is dated July 30, 1935, and if from Mr. Willingham to Mr. Kessnich at Atlanta:

"Attached hereto is contract for the 1935-36 product in the Southland Theater, Brownsville, Tenn. As you know, this is the town in which Mr. Tony Sudekum opened a house in opposition to our regular customer.

We believe it very much to our advantage to continue doing business with Mr. Lawing, therefore recommend acceptance of the deal attached.

Also attached is contract for the Strand Theater, Whiteville, Tenn. as this situation is also owned by [fol. 1574] Mr. Lawing and no doubt, in the event we do not accept the Brownsville deal we will have to forego the business in Whiteville.

We will appreciate your approving these contracts and giving them to Mr. Connors for final approval."

The next letter is dated July 30, 1935, from Mr. Willingham to Mr. T. J. Conners: (Reading)

"The writers's activities for week ending July 27th are as follows:

Memphis, Tenn. Daisy (colored) Theater. Sold 100 per cent new deal.

Brownsville, Tenn. Southland Theater. Mr. Mock secured a deal in this situation several weeks ago which the writer rejected. Went back into the town and improved the deal, so that it is acceptable, placing six pictures in the top bracket instead of three and

secured a slight increase on the lower bracket pictures. This deal is being forwarded you with a special recommendation as Brownsville is a Tony Sudekum town. Mr. Lawing has been buying our product for years and Mr. Sudekum came into his town and built an opposition house. Inasmuch as he was in the town first and has always played our product, believe it nothing but right that we continue to serve him. However, wish to [fol. 1575] go on record now that if anything comes up with reference to selling the balance of the Sudekum towns that I will not be held responsible for the selling of this contract. In the event you do not think we have used good judgment, please reject the deal. We might add Mr. Kessnich on his last visit to Memphis, told us to go ahead and sell this contract as Mr. Lawing was entitled to our product.

And there is a report with respect to——

Mr. Waller: Of course, that is objected to as hearsay, if your Honor please; I mean in addition to the other objections.

The Court: All right; overruled; go ahead.

Mr. Wright: The report with respect to Milan, Tennessee:

"Milan, Tenn. Milan Theater.

Humboldt, Tenn. Rex Theater.

Greenfield, Tenn. Greenfield Theater. Mr. Pouncey who operates theaters in these three towns is a 50/50 partner with Mr. Tony Sudekum. He advises he has bought all of the product he can use. Therefore, is [fol. 1576] unable to use our product under any circumstances. Think some pressure should be brought to bear on Mr. Sudekum to see if he can influence Mr. Pouncey to buy our product in these three situations inasmuch as he is a 50/50 partner. Might add Mr. Pouncey is now making plans to open a theater in Trenton, Tenn. in opposition to Mr. Washmon, our present account. Mr. Pouncey has not bought our product for two years and contends the reason he has been buying around us is that our product grosses less than any on the market."

Now, the report with respect to Ridgely, Tenn.:

"*Ridgely, Tenn. Palace Theater.* Mr. Haynes, another partner of Mr. Sudekum owns and operates six

theaters. Was unable to catch him in town, but talked to him on long distance on telephone in one of his other towns, and he still states he is not doing any buying as yet."

The Court: Is that very material, Mr. Wright?

Mr. Wright: I think it is very material as far as the Brownsville, Tennessee report is concerned.

[fol. 1577] Mr. Wright: It is quite apparent that in this correspondence the reason that the product was taken away in Brownsville, Tennessee, was because it had to be taken away in order to make the deals with the Sudekum circuit.

The Court: All right, the fact that it might be and might be something different, occurred to me as a different proposition.

Mr. Wright: I don't think it does offered by itself, I think it contains a part of that which is an issue in the suit, but with respect to this particular situation.

Mr. Waller: Your Honor, we contend that one letter or ten letters or twenty letters, written by Metro or any other Company, which are only written declarations, could not prove a conspiracy, they are only competent after the conspiracy has been proved.

The Court: Mr. Waller, in all these cases that have been decided under the Sherman Act, of course they did not [fol. 1578] sit down and write out an agreement, and you can prove it by all these facts.

Mr. Waller: By overt acts from which you can draw inferences.

Mr. Wright: There are only two more of these, if the Court please, a letter dated November 26, 1935, to Mr. Willingham, by Mr. Willingham to Mr. Kessnich, Government's exhibit number 168, and reads as follows:

"Inclosed find applications we took from Mr. C. C. Lawing for Brownsville and Whiteville, Tenn.

"We are sending you these contracts so that in the event you sell Mr. Sudekum for Brownsville though you would be interested in knowing how much money as well as news service that he can get or have secured from our old, regular account. Also, please take into consideration that if we sell Mr. Sudekum we will lose the Whiteville, Tenn., contract.

"Also inclosed is our complete file with reference to unplayed 1934-5 product in Humboldt, Tenn., together with a list of all unplayed product under contract in Humboldt, Tennessee, features, one reelers and two reelers, showing prices. We will appreciate your having Mr. Sudekum settle for this contract while there, if possible.

[fol. 1579] *possible.*

"Just as a reminder, when negotiating with Mr. Sudekum, please do not overlook selling him for the last two towns he acquired in our territory Milan and Humboldt. Certainly, if we take our product away from our old customer in Brownsville and give it to Mr. Sudekum in that situation, he should reciprocate by buying our product in Humboldt and Milan.

"Please return these contracts and file after they have served their purpose, and oblige."

The next is letter dated January 22, 1936, from Mr. Willingham to Mr. H. Postman, at the home office, marked Government's exhibit number 167, I will skip the first two paragraphs, the third, is—first four paragraphs, and reads as follows:

"As you know, this exhibitor operates the Southland theater, Brownsville, Tenn. He has been using our product in Brownsville ever since he has been in business and paid excellent rentals. However, we refused to sell him the 1935-36 product in Brownsville this season because Mr. Tony Sudekum has opened a theater in Brownsville and we had to sell our product to Mr. Sudekum.

[fol. 1580] The Court: What is the number of that exhibit?

Mr. Wright: That is No. 167.

Mr. Waller: Your Honor he said he had to sell, but of course that is a conclusion.

The Court: He did sell it to him, didn't he?

Mr. Waller: We object to it, Your Honor.

The Court: You can ask the witnesses about that, is that in the direct examination, you can ask the witness, that is exhibit No. 167.

Cross-examination.

By Mr. Waller:

Q. Mr. Willingham, I believe you say you were the branch manager at Memphis for Loew's, Incorporated?

A. Yes, sir.

Q. Where did you first know Mr. Lawing?

A. I met him when he opened the theater in Brownsville for the first time.

Q. Was that in 1932 or 1933?

[fol. 1581] A. I think it was in 1932.

Q. Do you know whether or not he previously had known you in Memphis, or whether or not you knew him previously in Memphis?

A. No sir, I did not.

Q. You saw him pretty frequently while he was operating the theater there in Brownsville?

A. Yes, sir.

Q. And you made contracts with him for Metro product?

A. Yes, sir.

Q. Do you keep records there at the Memphis office that would show what those contracts were, the date they were played off and what money the company received from them?

A. Yes, sir.

Q. You have those records here in Nashville?

A. Up in the hotel room.

Q. Now in addition to the letters that were introduced by the Government, did you write other letters from time to time in which Mr. Lawing was mentioned?

A. Lots of them.

Q. Do you have some of those letters here?

A. Yes, sir.

Q. Have quite a file, a complete file?

A. Yes, sir.

[fol. 1582] Q. Up in the hotel room?

A. Yes, sir.

Q. Will you bring in the morning with you the records which show the terms of the deals you made with Mr. Lawing at Brownsville, from the time he entered the town in 1932 or 1933, down to the time he quit doing business there,

and also the records as to the deals made with Crescent Amusement Company in the same town, from then on, the money received by Lawing from those deals?

A. Yes, sir.

Q. Will you also bring with you in the morning any letters you may have written to any officers or representatives of Lowe's in which you may have used expressions about Mr. Lawing's record, which are different from the expressions in these letters?

A. Yes, sir.

Q. Now taking up the first Government exhibit, which is a memorandum dated June 24, 1935 about Union City, in which it is stated that an independent exhibitor opened a theater in Union City, in opposition to Mr. Sudekum's first run house; do you remember who that independent exhibitor was?

A. Mr. J. W. Haynes.

Q. That was not Mr. Henry then?

A. No, sir.

[fol. 1583] Q. Mr. Henry came in there several years later?

A. Later, yes, sir.

The Court: Then what is the date of that?

Mr. Waller: That is dated June 24, 1935.

The Court: Mr. Henry didn't open in, at Union City until 1937.

Mr. Waller: He said this was Mr. Haynes that this memorandum referred to and not Mr. Henry, referred to in examination in chief, as to what their intent was and I just asked the witness, who was the independent, it was shown in the examination in chief that an independent came in, I just asked the witness who the indepen-t was, that was referred to, and he said it was Mr. Haynes. In other words, it was not the same Union City situation that is referred to and has been brought into this proof.

The Court: I understand it, I thought it was the other man.

Mr. Waller: I thought Your Honor might have had that impression.

[fol. 1584] The Court: I did have that impression.

Mr. Waller: Mr. Haynes is with the Strand Enterprises, one of the defendants in this case, and is at the present time?

A. Yes, sir.

The Court: How does that document shed light on the issues in this case?

Mr. Wright: Because Mr. Haynes was an independent in opposition to Mr. Sudekum in this city, the defendant Strand Enterprises was formed with Mr. Sudekum interested to the extent of a half interest in the business, and Mr. Haynes left Union City to Mr. Sudekum, and operated a series of theatres in a number of other towns in Arkansas and Mississippi, which were shown on their partnership with Mr. Sudekum. At the time this memorandum was written, he was not a partner of Mr. Sudekum, he was independent.

Mr. Waller: Only subsequently a partner.

[fol. 1585] Mr. Waller: When that memorandum was written, he was not a partner of Sudekum, he was an independent. As I understand it, the Corporation was organized in July or August, 1935. I take it the Government intends to prove those facts to let this memorandum in. They don't insist it is competent now. They started in 1934, I believe August, 1934, and went to August, 1939.

The Court: This was in 1935?

Mr. Waller: In 1935.

The Court: All right. The reason I was mixed up on that, there was some evidence by Mr. Henry, who testified, and there was a contract introduced here, that had first run at Crescent Theatre and second run at the Opera House, and the Opera House was closed at that time. All right, go ahead.

Mr. Waller: I take it, it must have been when it was closed.

The Court: I don't know.

Mr. Waller:

Q. Now, Mr. Willingham, there is a letter here of July 2, 1935 which is Government Exhibit No. 163, in which the statement is made:

> "We have a customer in Brownsville, Tennessee, that has been playing our product ever since he has been running a theatre there 100 per cent. He has [fol. 1585] bought and played everything we have released, without any trouble, every season."

Now, your records that you bring tomorrow will show the extent to which that was true?

A. (No reply.)

Q. It is next said, in the letter:

"Now Mr. Sudekum has gone into the situation and sat down on top of him."

What did you mean by that, Mr. Willingham? Do you mean by that, that the Crescent Amusement started a theatre in Brownsville where Lawing already had a theatre and Mr. Sudekum or Crescent Amusement Company's theatre was better and got most of the opposition's business?

Mr. Wright: That is pure argument. The letter there states what he says, it doesn't need any elaboration, except by way of argument. I don't think the witness is competent to just say yes to Mr. Waller's argument, about what it means.

The Court: On cross-examination, he may ask him what he meant by it.

Mr. Wright: In cross-examination on the subject the Government brought him here for. We brought him here as a hostile witness.

Mr. Waller: We object to that statement.

[fol. 1587] Mr. Wright: Mr. Willingham was brought here by the Government for just one purpose, because the defendants wouldn't stipulate the fact, that could easily have been determined, of course, the fact that he did write letters in the course of his employment. They are within their legal rights, that he be brought here for that purpose, but not so that they can have him to put on so much of their case as they want to get out of him during our case, they can't do that with him as our witness. It is enough of a good thing that we have to bring him here so that they can use him to identify the letters.

The Court: After all, they didn't ask you to file this lawsuit against them and when the Government files a case of this kind, it is incumbent upon the Government to make out its case; they don't have to agree to anything.

Mr. Wright: I say, he is well within his legal rights in having him come here; we are also within our rights to insist that the cross-examination be confined to the issue that he was brought here, that he did these things in the ordinary course of his business.

[fol. 1588] The Court: You have introduced the letters that he wrote and introduced statements made in his letter, then they have the right to cross-examine on any other statement.

Mr. Wright: I deny that he has a right to cross-examine on, that the only proper scope of the cross-examination of this witness is that made by the direct, did he or did he not write these letters in accordance or in the performance of his duties as Branch Manager.

The Court: I disagree with you on that.

Mr. Waller: There could be no such thing as cross-examination if you had to stick to the direct examination; just ask the same questions over again.

Mr. Wright: That is the Federal rule.

The Court: I never have been of the opinion that it was a very equitable rule. But that is neither here nor there, on this matter; they have the right to cross-examine about anything that is in the letters that you have introduced.

Mr. Wright: I don't see how that could be. If we had put him on the stand, if the Court please, and asked him to [fol. 1589] testify to the subject matters that are in the letters, and say what he thought about Mr. Lawing, or what he didn't think about it, then I think this kind of cross-examination would be proper.

[fol. 1590] The Court: For what purpose are you introducing those letters? To show the Court what they contain, what he was doing?

Mr. Wright: To show the Court the business——

The Court: That they couldn't sell Mr. Lawing any more pictures on account of the fact that Mr. Sudekum was buying in Brownsville? That is apparently the purpose that the letters were introduced for, it seems to me.

Mr. Wright: That is right.

The Court: Then he has got the right to ask about anything pertinent to that.

Mr. Wright: There is no question about his right to rebut that evidence and have this witness explain it or offer any other testimony that may throw light on these issues. The precise point is whether he is entitled to do that with Mr. Lawing as his witness or with Mr. Lawing as my witness, and I say that when he does that he is making Mr. Lawing his witness and putting on his case.

[fol. 1591] Mr. Waller: Your Honor, it seems the Government's idea is that when they file a complaint alleging anybody is a conspirator, that makes them a conspirator, and therefore he is our witness.

The Court: I overrule the objection. Adjourn Court until 9:30 in the morning.

Thereupon Court adjourned until 9:30 in the morning.

[fol. 1592] VOL. ELEVEN

Tuesday, July 22, 1941.

Court met pursuant to adjournment.

J. F. WILLINGHAM, cross-examination resumed.

By Mr. Waller:

Q. I do not find what I had yesterday—here it is. Now, Mr. Willingham, I was asking you about Mr. Sudekum coming into Brownsville and sitting down on top of Mr. Lawing; will you describe Mr. Lawing's theater and the Crescent theater which was competing with it, with respect to seating capacity, appointments, etc.

A. Mr. Lawing's theater which had about a hundred and eighty-three seats in it, a very small house, converted store building for it, to put the theater in, poorly equipped. The new theater which was built had about two and a half times as many seats and was modern and up to date.

Q. Well, such things as rest room facilities, did Mr. Lawing's theater have any?

A. Not that I know of, it was too small.

Q. I believe you overlooked bringing those papers, they are on the way down?

A. Yes, sir, they are on the way down.

Q. Now in your letter of July second, 1935, that I was ask-[fol. 1593] ing you about on yesterday, in which you used that expression, about Mr. Sudekum sitting down on top of Mr. Lawing; what do you mean by that phrase? Did you mean by that that Mr. Sudekum's theater was a larger, more up to date theater and attracted the patronage from the town of Brownsville from Mr. Lawing's theater?

Mr. Wright: Same objection, Your Honor, that was made yesterday. I do not think he is entitled to put the answer in the witness's mouth.

The Court: It is rather leading, I did not get the impression that was what he me-nt at all, I got the impression from the letter that Mr. Lawing had a theater there in operation and Mr. Sudekum just came in and opened up a theatre in opposition to him, or in competition, rather, and pre-empted his territory. You might ask what he knows about it.

Mr. Waller: Your Honor ruled I could cross-examine him.

The Court: No, I didn't say that, I said the question was leading.

Mr. Waller: I meant it to be leading, Your Honor.

[fol. 1594] The Court: Yes, that is right, you have a right to ask leading questions on cross-examination. I will overrule the objection.

Mr. Waller:

Q. What did you mean by that phrase, did you mean Mr. Sudekum had put up a larger, more up-to-date theatre, and that by doing so he was able to attract the patronage which Mr. Lawing had previously enjoyed?

A. That is a poor phraseology I used, coming in and sitting down on him; nevertheless, that is what I said. I meant that Mr. Sudekum came in and built a new, modern up-to-date theatre in opposition to one that was already there, which was a smaller house.

Q. That is all you meant by that?

A. Yes, sir.

Q. Is that a phrase that is used in the industry, sitting down on somebody?

A. Yes, sir.

Q. That is when a man is in a town and somebody comes in in competition?

A. Yes, sir.

The Court: All these gentlemen understood that when [fol. 1595] you said, It is generally understood when you sit down on somebody you do it to squelch them.

A. Not in the film business.

Mr. Waller:

Q. In this letter of July second you said this:

"We do not believe it would be fair for Mr. Sudekum to be privileged to buy product at Humboldt where he has two theaters and leave us out of Milan, Tennessee, and at the same time for us to sell him the product at Brownsville, Tennessee, in preference to a customer that was there before he was and wants to buy our product. Will you therefore please insist that Mr. Sudekum buy our product for both Milan and Humboldt, that you sell it to him for Brownsville.

Now, Mr. Willingham, who was buying product for those two towns, Milan and Humboldt?

A. This man Pouncey, he was already taking or buying for those two towns.

Q. And you were trying to get a contract for them too, to use the fact that you were selling Crescent in Brownsville to get Mr. Sudekum to use his influence with Mr. Pouncey to buy the product in those other towns?

A. I was trying to get Mr. Sudekum to use his influence so I could get to make all I could of the pictures, because I [fol. 1596] was there to sell him pictures in Milan, we hadn't done anything in two years.

Q. In your letter of July 30th to Mr. Conners which is Government exhibit 166, you say that Mr. Lawing secured a deal there at Brownsville at the Southland theatre several weeks ago, and the contract changed and that he then got a new application; do you recall that?

A. Yes, sir.

Q. Now I see in your letter of July 30th to Mr. Kessnich that you forward to him what you call a contract for the 1935-36 product in the Southland theatre, by the word contract, did you mean that application?

A. Yes, sir, I mean the application. A contract is not a contract until it is approved.

Mr. Waller: Your Honor, I intended to ask him about the papers he was going to bring but they have not gotten here, but they are on the way down here.

[fol. 1597] Q. I have here, Mr. Willingham, a photostat furnished us by the Government of a letter written by you to Mr. Connors at the Home Office, on May 28, 1935 pur-

porting to come from the Loew's files. I show you that letter and ask you if you wrote it on or about the date it bears?

A. Yes sir.

Mr. Waller: We offer this as Defendant's Exhibit No. 51.

Mr. Wright: May I ask what is the purpose for which the letter is offered?

Mr. Waller: That is in response to a letter offered by the Government and we want to show the whole picture instead of just a part of it.

The Court: What is the date of that letter.

Mr. Waller: May 28, 1935.

Mr. Wright: That has nothing to do with the Lawing letter.

Mr. Waller: I will read the parts that I think are pertinent.

The Court: Read the parts that are pertinent.

Mr. Waller: The letter is a photostat from the files of Metro which the Government examined: (Reading)

"Brownsville, Tenn., Southland Theatre. This exhibitor wants to buy our product but contends he cannot pay as much as he paid last year due to the fact [fol. 1598] that Tony Sudekum has come into his town and opened a theatre, dividing the business. Did not believe it advisable to make a deal with him at this time, under the circumstances.

Milan, Tenn. Milan Theatre.—This exhibitor advised on our first visit here this week, which was Tuesday, that he could not buy, or make us any kind of a deal as he was working on a deal to buy out Mr. Legg's Theatre in Humboldt, Tenn. and until after a deal had been made, he did not know just what he could do. Returned to this situation on Friday and a deal had been consummated whereby he had bought out both Mr. Legg's Rex Theatre and the opposition house in Humboldt, the Main street Theatre. He agreed to assume all companies' contracts in both houses and it developed they had more pictures bought in those two houses than he could run in the next two years. He stated it would be necessary for some of the film companies to make a great number of cancellations and do a great amount of trading between the two towns in

the three theatres before he would be in a position to know just how he stood insofar as number of pictures under contract in the two towns is concerned. He re-
[fol. 1599] fused to buy anything from us other than split service contracts and requested cancellation in Humboldt, although we have been out of Milan for two years. For your information, this man has affiliated himself with Mr. Sudekum, however, Mr. Pouncey will do the buying for both Humboldt and Milan and also will do the booking. Naturally, we refused to sell him the new product for either of his towns unless he bought 100 percent. We intend having an interview or session with Mr. Sudekum to see if we can't force Mr. Pouncey to buy our product in the two towns.

Q. Mr. Willingham, was it true that Lawing stated to you that he couldn't pay as much as he paid last year, due to the fact the Tony Sudekum had come into his town and opened a theatre, dividing the business?

A. I think that is what I have in the letter.

Mr. Wright: I object to his leading the witness at this point. This is a part where he makes him his witness.

The Court: What is the date of the letter?

Mr. Waller: May 28, 1935.

Mr. Waller: I will change the question to say——

Q. Was it or not, to take care of it?

A. My letter says he did ask that, doesn't it?

[fol. 1600] Q. Yes.

A. He must have or I wouldn't have written it.

Q. What did you mean by forcing Pouncey to buy your product in those two towns?

A. I meant that I was going to get Mr. Sudekum to use his influence on his partner to buy Metro-Goldwyn-Mayer product in the two towns he was buying and going the booking for.

Q. You were going to use your selling power on Pouncey?

A. No, we don't have any selling power.

The Court: Is this the 1935-1936 contract that you were trying to sell Lawing, that you had reference to?

A. Yes sir, to see if we could sell in all three of the towns of Humboldt, Milan and Brownsville.